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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KO SAI-MAN and CHUI KIM-CHUN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the presumption against retroactive legislation articulated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), bars application of 28 U.S.C. §1355(b), as amended October 1992, which for the first time confers jurisdiction and venue on United States District Courts in *in rem* forfeiture proceedings against overseas assets, to forfeiture actions pending at the time of its enactment.

2. Whether the retroactive application of 28 U.S.C. §1355(b), as amended in October 1992, which for the first time permits the seizure and forfeiture of assets located outside the territorial boundaries of the United States, raises concerns under the *Ex Post Facto* Clause of the United States Constitution and must therefore be applied prospectively to avoid a constitutional question.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the defendant assets, petitioners/claimants Ko Sai-Man and Chiu Kim-Chun and respondent/plaintiff the United States of America.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

KO SAI-MAN and CHUI KIM-CHUN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners Ko Sai-Man and Chiu Kim-Chun ("petitioners") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceedings on September 6, 1996.

I.

OPINIONS BELOW

The published opinion of the Court of Appeals for the Second Circuit is reprinted herein as Appendix A ("App. A"). The amended memorandum decision and judgment of the United States District Court for the Eastern

District of New York (Hurley, D.J.) granting petitioners' motion for judgment on the pleadings has been reported. It is reprinted herein as Appendix B ("App. B"). The judgment of the District Court for the Eastern District of New York dismissing the action for lack of *in rem* jurisdiction is reprinted herein as Appendix C ("App. C").

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment and opinion of the United States Court of Appeals for the Second Circuit was entered on September 6, 1996.

III.

CONSTITUTIONAL PROVISION INVOLVED

The *Ex Post Facto* Clause, U.S. Const. Art. I, §9, cl. 3, provides, in part:

> "No Bill of Attainder or ex post facto Law shall be passed."

IV.

STATUTES INVOLVED

Title 28, United States Code, Section 1355(b), as amended effective October 1992, provides, in part:

> (b)(1) A forfeiture action or proceeding may be brought in —
>
> (A) the district court for the

district in which any of the acts or omissions giving rise to the forfeiture occurred . . .

* * *

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

V.

STATEMENT OF THE CASE

In this *in rem* proceeding brought pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A), the United States seeks the forfeiture of approximately $1.5 million[1] in assets belonging to petitioners Ko Sai-Man ("Ko") and his wife, Chiu Kim-Chun (collectively, "petitioners"), comprised of cash, realty, and personalty, all located in Hong Kong. It is alleged that the defendants *in rem*, which were seized in April 1991, constitute proceeds traceable to a conspiracy to import heroin into the United States which operated during the period between January 1986 and September 1988. Petitioners,

[1] The Government estimates the present value of the restrained assets at approximately $3 million.

who are claimants in the underlying forfeiture action, are citizens and residents of Hong Kong. Neither petitioner has been charged with any crime in the United States and Mr. Ko was acquitted of drug trafficking charges in a Hong Kong prosecution instigated by the United States and arising from the same allegations as these forfeiture proceedings.

This petition arises from the Second Circuit's reversal of the order of the District Court for the Eastern District of New York dismissing the forfeiture complaint on the grounds that at the time the action was commenced in September 1991, the District Court lacked *in rem* jurisdiction and venue over assets located outside the territorial boundaries of the United States and that 28 U.S.C. §1355, as amended in October 1992, does not retrospectively vest the District Court with jurisdiction and venue over those assets.

In reversing the trial court, the Second Circuit held that the October 1992 amendments to 28 U.S.C. §1355 ("Section 1355(b)"), which for the first time authorize United States District Courts to adjudicate forfeiture actions against foreign assets previously immune to forfeiture, do not have retroactive effect under the rule articulated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), and are thus applicable to cases pending at the time of their enactment. The Second Circuit, relying primarily on the recent *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), also concluded that the presumption in favor of prospective application of new legislation to avoid constitutional issues does not bar retrospective application of the amendments because the forfeiture of the proceeds of drug trafficking and money laundering is strictly remedial and thus cannot offend the *Ex Post Facto* Clause.

In light of the foregoing, this petition raises two significant questions of federal statutory and constitutional law. First, whether the *Ursery* holding that civil forfeiture actions brought under 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A) are not punitive for purposes of the Double Jeopardy Clause is equally applicable to the *Ex Post Facto* Clause and, second, whether amended Section 1355(b), which for the first time grants the District Court jurisdiction and venue over actions seeking the forfeiture of foreign assets, operates retroactively, *i.e.*, changes the legal consequences of petitioners' past conduct.

The Initiation of Forfeiture Proceedings Against Petitioners' Hong Kong Assets.

In April 1991, the United States seized approximately $1.5 million of petitioners' assets located in Hong Kong. Subsequent to the seizure, the Hong Kong government prosecuted Mr. Ko in Hong Kong, alleging that between January 1986 and September 1988, Mr. Ko participated in a conspiracy to traffick in controlled substances. On September 4, 1991, Mr. Ko was acquitted in Hong Kong of all criminal charges and the restraining order against his assets was discharged.

Immediately following Mr. Ko's Hong Kong acquittal, the defendants *in rem*, were released. At the behest of the United States, however, the High Court of Hong Kong, in a decision rendered January 30, 1992, reinstated the restraining order retroactive to September 4, 1991 pursuant to Hong Kong's 1989 Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), as amended by a 1991 Order. Two weeks after the property was raciest, on September 20, 1991, the Government brought the instant action by filing a Verified Complaint

In Rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* 21 U.S.C. §881(b). The complaint was amended in minor respects on October 16, 1991. The complaint, together with Warrants of Arrest issued under Supplemental Admiralty Rule C(3), were served in Hong Kong.

The Amended Verified Complaint *In Rem* asserts that the defendant assets are subject to forfeiture to the United States as proceeds of narcotics activity and "property traceable thereto in accordance with 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A)." In substance, the complaint alleges a conspiracy from 1986 to 1988 "to smuggle heroin from Hong Kong into the United States and to launder the proceeds of trafficking in heroin." The complaint elaborates that over the two-year period, approximately ten named individuals assumed various roles in smuggling heroin into the United States on approximately six occasions, and that the heroin was destined for purchase by named co-conspirator, Eng Sui-Hang, a/k/a Johnny Eng, who was subsequently prosecuted in the Eastern District of New York.

Specific allegations concerning Mr. Ko are sparse. Specific allegations tying Mr. Ko and/or the restrained assets to the Eastern District of New York are non-existent. According to the complaint, in November 1986, Mr. Ko "oversaw the conversion from bulk form to a more concealable form" of six kilograms of heroin thereafter smuggled into the United States through Tokyo by two other named individuals and in "April/ May 1988, Johnny Eng purchased . . . in Hong Kong" from three other named individuals 49 kilograms of heroin that Mr. Ko had allegedly delivered to a named middleman, also in Hong Kong.

The complaint further recites that on June 27 and July 4, 1988, Mr. Ko received $168,500 in the form of 200

money orders drawn on 28 United States banks and that in September 1988, petitioners established Eastlex, Ltd. (Eastlex), a real estate investment company. The complaint then proceeds to identify, as defendants *in rem* subject to forfeiture to the United States as proceeds traceable to Mr. Ko's narcotics trafficking here, some twelve parcels of realty purchased by Eastlex or petitioners and various bank accounts, currency, stock, and other personalty owned by them. There is no allegation that any of the defendants *in rem* were removed from the United States, much less the Eastern District of New York.

The Trial Court Proceedings.

In April 1992, petitioners moved for judgment on the pleadings under Fed.R.Civ.P. 12(c) on the ground that at the time the action was commenced, no statute provided the district courts of the United States with *in rem* jurisdiction, venue or the authority to issue process over assets located outside the district, much less outside the territorial boundaries of the United States. The Government vigorously resisted the motion, erroneously urging that jurisdiction obtained at the time of the seizure under federal statutory and case law in effect at the commencement of the action.

In October 1992, while petitioners' motion for judgment on the pleadings was pending, Congress amended Section 1355(b) to fill the gap in existing forfeiture law by providing district courts with venue, *in rem* jurisdiction and service of process over assets located outside the district, including assets outside the territorial boundaries of the United States. Although passage of the amendments confirmed that, at the time the action commenced in September 1991, the District Court for the

Eastern District of New York lacked jurisdiction and venue over the proceedings against the Hong Kong defendants. Undeterred by the inconsistency with its former position, the Government immediately averred that the amendments applied to actions commenced prior to their enactment, retroactively vesting the district court with the requisite jurisdiction and venue.

The Findings of the Trial Court.

In a Report and Recommendation filed on November 12, 1993, Magistrate Judge Allyne Ross found that the District Court lacked *in rem* jurisdiction and venue over the defendant *res* and recommended that petitioners' motion for judgment be granted and the action dismissed. Over the Government's objection, on April 8, 1996, almost five years after the commencement of the action, the District Court adopted the Report and Recommendation and ordered the complaint *in rem* dismissed for lack of *in rem* jurisdiction and venue.

Like Magistrate Judge Ross, the District Court concluded that at the time of the initial seizure in September 1991, no statute conferred the District Court with *in rem* jurisdiction or venue over petitioners' Hong Kong *res*. The trial court also found that express language and legislative history of the amendments lacked a clear indication of Congressional intent that the amendments apply to conduct completed prior to their enactment and thus Section 1355(b) is prospective only. In reaching its decision, the trial court invoked the deep rooted presumption against retroactive legislation, recently emphasized in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), and the presumption in favor of prospective application of intervening legislation to

avoid even the "specter" of a constitutional issue, in this case, a violation of the *Ex Post Facto* Clause.

The District Court's amended decision memorandum and order granting petitioners' motion for judgment on the pleadings and ordering the action dismissed was entered on April 25, 1996.

The Decision of the Court of Appeals.

The Government filed a timely notice of appeal. On appeal, the Government abandoned any claim that the District Court had *in rem* jurisdiction or venue over foreign assets at the time of the initial seizure, conceding that at the time this action commenced in September 1991, the United States District Court for the Eastern District of New York lacked jurisdiction, venue and the authority to serve process over the defendant *res* in Hong Kong. Accordingly, the Government's appeal focused solely on whether Section 1355(b) applies to an action commenced prior to its enactment.

On June 24, 1996, the Second Circuit reversed the District Court's Order granting petitioners' motion for judgment on the pleadings. In reversing the trial court's ruling, the Second Circuit concluded that under the rule enunciated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), amended Section 1355(b) which for the first time permitted the United States to confiscate assets located abroad did not have retroactive effect, but was "quintessentially procedural," and that the forfeiture of alleged proceeds of criminal activity is strictly remedial only, and thus the retrospective application of the amendments cannot implicate the *Ex Post Facto* Clause.

VI.

REASONS FOR GRANTING THE WRIT

Prior to its amendment, 28 U.S.C. §1355, simply granted district courts original jurisdiction to hear certain actions, including forfeiture proceedings, arising under any Act of Congress. The amendments, which broadened the jurisdictional basis for forfeiture proceedings, provide, in part:

> (b)(1) A forfeiture action or proceeding may be brought in —
>
> (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred . . .
>
> * * *
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

It is not contested that amended Section 1355(b) now provides District Courts of the United States with jurisdiction and venue over *in rem* forfeiture actions directed against assets located outside the United States where none previously existed. The only issue remaining is whether the October 1992 amendments can be applied to

cases pending at the time of their enactment, or whether retrospective application is barred by a presumption against retroactive legislation.

The Amendments to 28 U.S.C. Section §1355(b) Which Provide United States District Courts With Jurisdiction and Venue In Forfeiture Actions Directed At Assets Located Abroad Must Be Applied Prospectively Under the Default Rule Articulated in *Landgraf v. USI Film Products*.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), this Court announced the test for deciding whether a statute applies to cases pending at the time of its enactment. *Landgraf* sets forth a two-step analysis for determining whether to apply an intervening statute to a pending case. First, the court must determine "whether Congress has expressly prescribed the statute's proper reach." 114 S.Ct. at 1505. If so, "there is no need to resort to judicial default rules." *Ibid.* If, on the other hand, the statute lacks clear language requiring retrospective application, the court must determine if the statute "would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* A statute which operates retroactively, may not be applied in proceedings commenced prior to its enactment, absent a clear indication of Congressional intent.

In holding that the test for retroactivity is "whether the new provision attaches new legal consequences" to past events, the Court reinforced the traditional presumption against retroactive legislation, emphasizing that:

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' *Kaiser*, 494 U.S. at 855, 110 S.Ct. at 1586 (SCALIA, J., concurring.)."

Landgraf, 114 S.Ct. at 1497.

Whether a statute has retroactive effect is a fact intensive inquiry in which "judges tend to have 'sound . . . instinct[s],' see *Danforth v. Groton Water Co.* 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901) (Holmes J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf*, 114 S.Ct. at 1499.

It is uncontroverted that amended Section 1355(b) lacks clear language requiring retrospective application. The Second Circuit thus applied the default rule enunciated in *Landgraf*, concluding that Section 1355(b), which for the first time permitted the government of the United States to seize and forfeit the overseas assets of foreign citizens, does not attach new legal consequences to prior conduct. The Second Circuit reasoned that the underlying conduct, alleged drug trafficking and money laundering, were illegal at the time the action com-

menced and therefore foreign citizens such as Mr. Ko have always had "fair notice" that their property is subject to confiscation by the United States. Thus, in the opinion of the Second Circuit, petitioners, who are citizens of Hong Kong, should not have been surprised when $1.5 million in property accumulated and located in Hong Kong was suddenly vulnerable to forfeiture by the United States, even though Mr. Ko had been acquitted of all criminal charges in Hong Kong.

The Second Circuit misconstrued *Landgraf* by focusing on the underlying conduct rather than the consequences wrought by the newly enacted provision. The relevant inquiry under *Landgraf* is not whether petitioners had notice that the underlying conduct was illegal, but whether the intervening legislation altered the consequences of that conduct. In *Landgraf* itself, this Court held that Section 102(b)(1) of the Civil Rights Act of 1991, which increased compensatory and for the first time provided punitive damages in civil rights actions, had an impermissible retroactive effect even though the underlying conduct "had been unlawful for more than a generation." *Landgraf*, 114 S.Ct. at 1506, n.35.

Thus, *Landgraf* teaches that an intervening statute operates retroactively where a party previously liable is exposed to a "new disability in respect to past events." *Id.* at 1507, citing *Society for Propagation of the Gospel*, 22 F.Cas. at 767. The court must therefore consider "[t]he *extent* of a party's liability, in the civil context as well as the criminal" which "is an important legal consequence that cannot be ignored." *Landgraf*, 114 S.Ct. at 1507 and n.36. (Emphasis original.)

In this regard, the *Landgraf* Court emphasized that, absent clear language prescribing a statute's reach, it had never read a statute "substantially increasing the

monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Ibid.* In fact, "the largest category of cases in which the Court has applied the presumption against statutory retroactivity has involved new provisions affected contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 1500 and n.25.

In *United States v. $814,254.76 in U.S. Currency, Contents of Valley National Bank Account No. 1500-8339*, 51 F.3d 207 (9th Cir. 1995), the Ninth Circuit concluded that, as amended by the Annunzio-Wylie Money Laundering Act of 1992, 18 U.S.C. §984, which for the first time authorized the forfeiture of substitute assets in money laundering cases, "[o]n its face," " 'attaches new legal consequences to events completed before its enactment' " because "the extent of a bank's liability for knowingly permitting its accounts to be used for money laundering has significantly increased." *Id.* at 210. Since the new statute operated retroactively, the *Landgraf* presumption against retroactivity applied, notwithstanding the government's claim that the statute was strictly procedural. *Id.* at 212. Thus, the amendments[2] create a new disability and are thus presumptively prospective.

In rendering its decision, the Ninth Circuit squarely rejected the Government's contention that, as amended, 18 U.S.C. §984 applied to prior conduct, whether or not Congress so intended, because, under *Landgraf*, the amendments were purely procedural. *Id.* at 211-212. Like the Second Circuit in *$814,254.76 in U.S. Currency*, the Government reasoned that 18 U.S.C. §984, which for the first time permitted forfeiture of funds not

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[2] This is the same legislation which included the amendments to 28 U.S.C. §1355 which are at issue here.

previously subject to forfeiture, did not operate retroactively because money laundering was illegal at the time the action commenced. *$814,254.76 in U.S. Currency*, 51 F.3d at 210. Thus, the Government concluded, the new provision did not upset settled expectations regarding rights, liabilities or duties. *Id.*

In flatly rejecting the notion that the statute was strictly procedural because money laundering was illegal at the time the action commenced, the Ninth Circuit noted that,

> [I]n considering whether retrospective application of a statute is 'retroactive' under *Landgraf*, simple categorization is not sufficient. Instead, the "process of judgment" the court must undertake may lead to the conclusion that some "seemingly procedural" changes in the law may impact upon substantial rights in a way that supports the presumption against retroactivity absent clear indications of congressional intent to the contrary.

Id. at 212.

In light of the clear import of *Landgraf* and *$814,254.76 in U.S. Currency*, it cannot be seriously argued that the October 1992 amendments to 28 U.S.C. §1355, which allow the United States to forfeit over $1 million in foreign assets previously immune from forfeiture, does not significantly increase the liability of petitioners (who are foreign nationals, not conversant with the laws of the United States and have never been charged with any crime in the United States) for conduct allegedly completed in 1988, *four years prior to the enactment of the amendments.*

To the contrary, *Landgraf* and *$814,254.76 in U.S. Currency* leave no doubt that by allowing the seizure of foreign assets not previously vulnerable to forfeiture, amended Section 1355(b) operates retroactively by significantly increasing petitioners' liability. Moreover, while petitioners may have been on notice that drug trafficking an money laundering activities are subject to criminal prosecution both in Hong Kong and the United States, petitioners were not on notice that virtually all of their Hong Kong assets were in jeopardy of forfeiture by the United States Government even though Mr. Ko was acquitted of all criminal charges. Nor could petitioners reasonably be expected to conceive that under the arcane admiralty laws which govern forfeiture, a New York court could effectively order the seizure and forfeiture of all his assets for conduct found innocent by a Hong Kong court and which, assuming *arguendo* did occur, by the Government's own allegations, occurred entirely in Asia.

The increased disability, lack of notice and unfair surprise threatened by legislation which would allow the Government to strip foreign citizens of assets previously beyond the reach of the forfeiture laws of the United States, dictate that Section 1355(b) be applied prospectively.

Nevertheless, as a fallback, the Second Circuit noted that, in any event, amended Section 1355(b) is a jurisdictional statute, which is "quintessentially procedural," and is thus exempt from the presumption against retroactive legislation. In this regard, the Second Circuit relies on *dicta* in which the *Landgraf* Court observed that rules which "confer or oust" jurisdiction are routinely applied retrospectively because,

> [a]pplication of a new jurisdictional rule *usually* "takes away no substan-

> tive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U.S., at 508, 36 S.Ct. at 202. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights and obligations of the parties," *Republic Nat. Bank of Miami*, 506 U.S. 55, 71, 113 S.Ct. at 565 (THOMAS, J. concurring).

Landgraf, 114 S.Ct. at 1502. (Emphasis added.) Similarly, "changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," because "rules of procedure regulate secondary rather than primary conduct" and thus the application of a new procedural does not have retroactive effect. *Ibid.*; cf. *McBurney v. Carson*, 99 U.S. 567, 569, 25 L.Ed. 378 (1879).

Consistent with these general rules, the Second Circuit concluded that the amendments do not raise any concerns about retroactivity because they reach only secondary conduct, to specifically, "the court's — its jurisdiction — over the res located overseas," not any primary or substantive right of petitioners. The Second Circuit's finding is directly contrary to the Ninth Circuit's holding in *United States v. $814,254.76 in U.S. Currency, Contents of Valley National Bank Account No. 1500-8339*, 51 F.3d 207 (9th Cir. 1995) that legislation expanding forfeiture law to reach assets previously immune to forfeiture attaches new legal consequences to past conduct and is thus prospective only. *See supra.*

Moreover, the Second Circuit's ruling essentially imposes a blanket rule that statutes which affect jurisdiction cannot have retroactive effect and may thus always

be applied to pending cases. *Landgraf*, however, does not stand for such a sweeping proposition. Indeed, the *Landgraf* Court explicitly rejected such an expansive rule, cautioning that "Nor do we suggest that concerns about retroactivity have no application to procedural rules." *Landgraf*, 114 S.Ct. at 1502-03, n.29. The Ninth Circuit has explained that *Landgraf* imposes a rebuttable presumption in favor of retroactivity for purely jurisdictional statutes. The presumption may be rebutted by "some indication that the jurisdictional rule curtail[s] a substantive right by 'impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed.' " *United States ex. rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512, 1517 (9th Cir. 1995), citing *Landgraf*, 114 S.Ct. at 1502, 1505, *petition for cert. filed*, 64 U.S.L.W. 3593 (February 15, 1996) (No. 95-1340).

In other words, whether the statute is procedural or jurisdictional is not the dispositive issue. Even "procedural" and "jurisdictional" statutes are impermissibly retroactive if they affect the legal consequences of past conduct. Thus, the relevant inquiry is whether new legislation would impair substantive rights, alter the legal consequences of the defendant's conduct or increase the liability for past conduct — not whether the legislation can be labelled "jurisdictional" or "procedural."

Further, *Landgraf* explicitly instructs that there is no blanket rule that even "remedial" statutes, like procedural statutes, should be presumptively applied to pending cases. Rather, while that rule holds true for some remedies, "we have not classified a statute introducing damages liability as the sort of 'remedial' change that should presumptively apply in pending cases."

Landgraf, 114 S.Ct. at 1507 n.37. Thus, even if civil forfeiture of the proceeds of narcotics trafficking is strictly remedial, *see, infra*, statutes which extend forfeiture to assets previously outside the purview of those proceedings, are presumptively prospective.

In sum, whether labelled "procedural" or "jurisdictional," legislation which permits the Government of the United States to reach beyond its borders, to seize the assets of foreign citizens, significantly increases the disability on petitioners for past conduct, which, if it occurred, was completed over four years prior to the amendments. Fundamental notions of fairness which demand that individuals be afforded notice of the consequences of their conduct, also require that the presumption against retroactive legislation be applied to bar of application of amended Section 1355(b) to this action.

Amended Section 1355(b) Which Expands Jurisdiction To Foreign Assets Not Previously Vulnerable to Forfeiture Raises *Ex Post Facto* Concerns Which Trigger a Presumption in Favor of Prospective Application.

Having determined that amended Section 1355(b) does not operate retroactively, the Second Circuit next considered whether there is a constitutional infirmity which bars application of amended Section 1355(b) to a case pending at the time of its enactment; specifically, whether retroactive application of Section 1355(b) raises *ex post facto* concerns.

The *Ex Post Facto* Clause, U.S. Const. Art. I, §9, cl. 3, prohibits retroactive application of penal legislation. The *Ex Post Facto* Clause not only ensures that individuals have " 'fair warning' about the effect of criminal

statutes, but also 'restricted governmental power by restraining arbitrary and potentially vindictive legislation.' " *Landgraf*, 114 S.Ct. at 1497-98, quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct 960, 67 L.Ed. 17 (1981).

"[T]o fall within the *ex post facto* prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 427, 431 (1987), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981). A law is retrospective and thus potentially violative of the *ex post facto* prohibition "if it 'changes the legal consequences of acts completed before its effective date.' " *Miller*, 492 U.S. at 431, quoting *Weaver*, 450 U.S. at 31. "Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties." *Louis Vuitton S.A.*, 765 F.2d at 972 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion of Frankfurter, J.)). "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts." *DeVeau*, 363 U.S. 160.

The *ex post facto* bar was incorporated into the Constitution in two places, prohibiting such retroactive legislation by both Congress and state legislatures. Article I of the Constitution provides, at §9, Clause 3, that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." It also provides, at §10, Clause 1, that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or law impairing the Obligation of Contracts. . . ." The Constitution makes no civil or criminal distinction for determining the applicability of the *Ex Post Facto*

Clause. Further, an analysis of the historical background of the *Ex Post Facto* Clause suggests that the framers intended the clauses reach all retrospective laws, regardless of whether they were deemed purely criminal in nature. *See* Jane H. Aiken, *Ex Post Facto in the Civil Context*, 81 Ky. L.J. 929-32 (1993).

The 'cardinal principle' that a court adopt a construction that avoids constitutional questions compels a prospective construction of 28 U.S.C. §1355 because retroactive application of the statute would raise grave constitutional questions. As explained in *Louis Vuitton S.A. v. Spencer Handbags Corp.*:

> Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," or an indication that the constitutional question is "non-frivolous." "Even the specter of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief.

Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 971 (2d Cir. 1985) cited with approval in *Landgraf*, 114 S.Ct. at 1505-06.

Applying this rule, the *Vuitton* court held that the treble damages provision of the Trademark Counterfeiting Act of 1984, a civil statute, raised constitutional questions concerning, in part, the *Ex Post Facto* Clause, mandating a prospective construction of the statute to render constitutional analysis unnecessary.

> "we do not, and need not, decide the constitutional questions; we need only determine that the *ex post facto* . . . question[] [is] sufficiently serious to persuade us to choose the construction that avoids the constitutional issue[]."

Vuitton, 765 F.2d at 971.

In analyzing the legislative history of the amendment awarding treble damages in trademark counterfeiting cases, the *Vuitton* court concluded that Congress intended, at least in part, "to penalize counterfeiters as a means of deterrence." *Vuitton*, 765 F.2d at 972. Cautioning that "[w]e do not decide that retroactive application of this statute would violate the *ex post facto* prohibition, only that it would raise the issue," the court concluded that "exclusively prospective application [is] the better course." *Id.*

Landgraf confirms that to implicate the *Ex Post Facto* Clause, legislation need not be penal, but must simply "share key characteristics" of criminal sanctions. Thus, in its discussion of punitive damages, *Landgraf* instructs that:

> "the very labels giving 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. *See Turner Elkhorn*, 428 U.S. at 17, 96 S.Ct. at 2893 (Court would 'hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthi-

> ness'); *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct 1146, 1155, 4 L.Ed.2d 1109 (1960)('The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts'). *See also Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 'would present a potential *ex post facto* problem.')"

Landgraf, 1505-06.

In *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993), this Court held that, in certain circumstances, civil forfeiture is not remedial, but constitutes punishment. In *Austin*, the Court held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture proceedings. After defining the determinative "question as not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment," *id.* at 2806, the Court proceeded to review English and American law of forfeiture at the time the Eighth Amendment was ratified, concluding that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." 113 S.Ct. at 2810.

The Court also concluded that forfeitures under 21 U.S.C. §881(a) are properly considered punishment today, citing the statute's focus on the owner's culpability by "expressly provid[ing] an 'innocent owner' defense," *ibid.*, and the Congressional choice "to tie forfeiture directly to the commission of drug offenses."

Id. at 2811. Finally, the Court found that "[t]he legislative history of §881 confirms the punitive nature of these provisions," writing:

> When it added subsection (a) (7) to §881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S.Rep. No. 98-225, p. 191 (1983). It characterized the forfeiture of real property as "a powerful deterrent." *Id.* at 195. See also Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes").

Id. at 2811 (footnote omitted).

Based primarily on the *Ex Post Facto* Clause's language and the *Austin* holding, the trial court concluded that the retrospective application of the amended Section 1355(b) to this Court would raise grave doubts concerning the constitutionality of retroactively applying 28 U.S.C. §1355(b) — rendering subject to *in rem* forfeiture assets previously free from monetary punishment — to cases pending at the time of its enactment. Accordingly, under the "cardinal principle" of statutory construction applied in *Vuitton*, mandating an interpretation that avoids constitutional issues without deciding them, it was incumbent upon the court to deny Section 1355(b) retrospective application.

On June 24, 1996, however, this Court handed down its opinion in *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), holding that civil forfeiture actions directed to the proceeds of drug trafficking or money laundering pursuant to 21 U.S.C. §881 (a)(6) and 18 U.S.C. §981 (a)(1)(A), which control this action, are not punitive for purposes of the Double Jeopardy Clause. In reaching this decision, the Court limited the *Austin* holding to the Excessive Fines Clause of the Eighth Amendment and to forfeiture actions brought pursuant to 21 U.S.C. §881 (a)(4) and (a)(7), which govern the forfeiture of the instrumentalities of crime, not the proceeds of illegal activity. 116 S.Ct. at 2146, 2148.

Based on *Ursery*'s reasoning, the Second Circuit rejected the District Court's reliance on *Austin*, concluding that forfeitures directed at the proceeds of crime are not penal and thus there can be no "substantial doubt" that the retroactive application of Section 1355(b) would survive a challenge under the *Ex Post Facto* Clause.

The Second Circuit's reliance on *Ursery* was misplaced. *Ursery* holds that civil forfeiture actions directed at the proceeds of illegal activity are not punitive for purposes of the Double Jeopardy Clause. Neither *Ursery*, nor any other decision of this Court, reaches the issue of whether the civil forfeiture of proceeds implicates the *Ex Post Facto* Clause. Indeed, to raise *ex post facto* concerns, intervening legislation need not be penal or punitive, but need only share the characteristics of a penal sanction, namely, the "imposition of liability on any theory of 'deterrence . . . or blameworthiness.' " *See Landgraf*, 114 S.Ct. at 1505, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16, 96 S.Ct. 2882, 2892-93 (1976). This is in marked contrast to a double jeopardy analysis which requires a definitive showing that a second remedy is, in fact, punitive.

Although forfeitures may be "civil" in nature, there is no doubt that they share certain punitive aspects. *Austin* teaches that throughout history forfeitures have been intended to punish blameworthy owners. *Austin*, 509 U.S. at 629. Nothing in the *Ursery* holding abrogates this well-entrenched notion that civil forfeitures are intended, in some measure, to deter future crimes by providing for the seizure and confiscation of their proceeds from those deemed culpable. *See, e.g., Ursery*, 116 S.Ct. at 2135 (Kennedy, J., concurring) (does not question the punitive nature of § 881(a)(7); forfeiture "punishes an owner by taking property involved in a crime.").

This is all that is required to raise the specter of an *Ex Post Facto* Clause violation. Even the "specter" that the *Ex Post Facto* Clause might be implicated by the retroactive application of the October 1992 amendments is sufficient to trigger the presumption in favor of construing the amended Section 1355(b) prospectively in order to avoid a constitutional issue.

CONCLUSION

In conclusion, the October 1992 amendments to 28 U.S.C. §1355(b), which would strip petitioners of $1.5 million in real and personal property not previously subject to forfeiture under the laws of the United States, are, on their face, retrospective; significantly increasing petitioners' liability for conduct completed prior to their enactment. Accordingly, in the absence of clear Congressional intent to the contrary, the amendments must be presumed prospective. Moreover, 28 U.S.C. §1355(b), which expands the jurisdictional reach of federal civil forfeiture statutes to encompass assets located in foreign countries, applies prospectively

because a contrary construction would raise the constitutional issue of whether retrospective application would violate the *Ex Post Facto* Clause.

For all the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: December 5, 1996.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

96 F.3d 20; 1996 U.S. App. LEXIS 23606

Docket No. 96-6125

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
CERTAIN FUNDS CONTAINED IN
ACCOUNT NOS. 600-306211-006,
600-306211-011 AND 600-306211-014
LOCATED AT THE HONG KONG AND
SHANGHAI BANKING CORPORATION, et al.,
Defendants.
KO SAI-MAN, CHUI KIM-CHUN,
Claimants-Appellees.

July 15, 1996, Argued
September 6, 1996, Decided

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge) dismissed a civil forfeiture action against property located overseas for lack of *in rem* jurisdiction because the amendment to 28 U.S.C. § 1355(b), conferring jurisdiction, does not apply retroactively to a civil forfeiture action pending before the effective date of the amendment. The district court also held that applying the statute retroactively could violate the Ex Post Facto Clause of the Constitution, and, therefore, in order to avoid possible constitutional problems, the statute should only be applied prospectively.

DISPOSITION: Reversed and remanded.

COUNSEL: ARTHUR P. HUI, Assistant United States Attorney, Eastern District of New York (Zachary W. Carter, United States Attorney, Varuni Nelson, Assistant United States Attorney, Eastern District of New York, of counsel), for plaintiff-appellant.

BRIAN A. SUN, Santa Monica, California (Ellyn S. Garofalo), O'Neill, Lysaght & Sun, Santa Monica, California. Joseph W. Ryan, M. Elisabeth Bergeron, Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, Uniondale, New York, of counsel), for claimants-appellees.

JUDGES: Before: WINTER and CABRANES, Circuit Judges, and MOTLEY, District Judge*.

*The Honorable Constance Baker Motley, of the United States District Court for the Southern District of New York, sitting by designation.

OPINION BY: JOSE A. CABRANES

OPINION: JOSE A. CABRANES, Circuit Judge:

In this appeal from a judgment for the appellees entered in the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge), we are asked to decide whether 28 U.S.C. § 1355(b)

("section 1355(b)"), an amendment to the jurisdictional provisions of a civil forfeiture statute providing federal courts with jurisdiction over *res* located overseas, can be applied to an action begun before the effective date of the amendment. In addition, we consider whether so applying the amendment would present a likelihood of violating the Ex Post Facto Clause of the Constitution. In this effort we are guided by a recent decision of the Supreme Court that was not available to the district court when it rendered its decision. Finding that case dispositive, we hold that the amendment may be applied to civil forfeitures pending on the effective date of the amendment, and that it suffers no infirmity under the Ex Post Facto Clause. Accordingly, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

I.

BACKGROUND

The following facts, taken from the opinions of Judge Hurley and then-Magistrate Judge Allyne R. Ross, are not disputed by the parties. In this *in rem* proceeding, brought under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A), the Government seeks forfeiture of assets, valued at between 1.5 and 3 million dollars, located in Hong Kong. It alleges that the defendants *in rem* constitute proceeds of a conspiracy to import heroin into the United States and to launder the proceeds of that smuggling. The two claimants to the property, Ko Sai-Man and his wife, Chui Kim-Chun (jointly, "claimants"), are citizens and residents of Hong Kong. On September 4, 1991, Ko was acquitted in a Hong Kong court of charges of conspiracy to traffic in controlled substances. Chui was not prosecuted in Hong Kong

and neither claimant was ever charged in a criminal prosecution in the United States. Immediately after the acquittal of Ko in Hong Kong, the defendant assets, which had been under restraint, were released by the High Court of Hong Kong. At the request of the United States, however, the Hong Kong Government immediately reinstated the seizure order, thereby keeping custody of the defendants *in rem* in anticipation of the instant forfeiture action. On September 20, 1991, the Government filed the Verified Complaint in this action in the Eastern District of New York. That complaint alleged that the claimants, and others, "engaged in a conspiracy to smuggle heroin from Hong Kong into the United States [through, among other places, John F. Kennedy International Airport in the Eastern District of New York] and to launder the proceeds of trafficking in heroin." The complaint further alleged that the various listed properties located in Hong Kong "constitute proceeds traceable to the sale, manufacture, transportation and/or distribution of a controlled substance . . . in violation of 21 U.S.C. § 841 et seq." The complaint, warrant of arrest, and the first set of interrogatories directed to the claimants were sent to the Hong Kong Government. These documents were served by members of the Royal Hong Kong Police upon the two claimants.

The claimants filed their claim and answer pro se on October 15, 1991, in which they did not challenge the district court's jurisdiction over the *res*. On April 6, 1992, the claimants filed a motion for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c), requesting that the court dismiss the complaint for lack of jurisdiction over the *res* because the *res* was located outside the United States, and no statute conferred jurisdiction on the federal courts in these circumstances. The Government responded by asserting, inter alia, that the claimants had waived any such objections by failing to object

to jurisdiction in their original claim and answer. In October 1992, while the claimants' motion was under advisement in the district court, the statute conferring jurisdiction on federal courts over civil forfeiture proceedings was amended to provide district courts with *in rem* jurisdiction over a *res* located in a foreign country. Anti-Money Laundering Act, Pub. L. No. 102-550, at 1521, 106 Stat. 4044, 4062 (codified at 28 U.S.C. § 1355(b)). 28 U.S.C. § 1355 was amended by adding a new part (b), which provides in pertinent part that whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought [in the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred,] or in the United States District Court for the District of Columbia.

Following the enactment of this amendment, the parties presented arguments to the district court on the question of whether the statute applied retroactively and, in particular, whether it could be applied in the instant action.

In a Report and Recommendation filed November 16, 1993, Magistrate Judge Ross recommended granting claimants' motion for judgment on the pleadings, finding, inter alia, that the October 1992 amendment to 28 U.S.C. § 1355 did not apply retroactively.[1] She reasoned that there was nothing on the face of the

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[1] Relying largely on the pro se status of the claimants at the time of filing their claim and answer, the magistrate judge recommended, and the district judge agreed, that the claimants had not waived their jurisdictional objections. This expedited appeal only concerns the merits of the question of the retroactivity of 28 U.S.C. § 1355(b).

amendment or in its legislative history to suggest that it should apply retroactively and, in addition, that such retroactive application "would raise grave constitutional questions concerning the Ex Post Facto Clause." Pursuant to FED. R. CIV. P. 72(b), the Government objected to the magistrate judge's report and recommendations, and Judge Hurley, upon de novo review, adopted the report and recommendation, granting claimants' motion for judgment on the pleadings and dismissing the civil forfeiture action.

In granting the claimants' motion, Judge Hurley started from the premise, enunciated in a recent Supreme Court case, that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994). He recognized, however, that this presumption can be overcome by a clear showing of congressional intent to make the new statute retroactive. He then found that the legislative history of section 1355(b) revealed no such intent. Judge Hurley also rejected the government's argument that retroactive application of the statute would not violate the Ex Post Facto Clause of the Constitution.[2] Quoting from *Louis Vuitton S.A. v. Spencer Handbags*, 765 F.2d 966, 971 (2d Cir. 1985), Judge Hurley relied on "clear Second Circuit precedent [that] indicates that where retroactive application of a statute would raise 'even a spectre of a constitutional issue,' a court will choose to apply a statute prospectively in order to avoid that issue." Finding no authority to support the Government's argument that the retroactive

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[2] "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, at 9, cl. 3. The phrase "ex post facto" is translated as "after the fact." BLACK'S LAW DICTIONARY 580 (6th ed. 1990).

application of section 1355(b) would raise no Ex Post Facto Clause issue, the district court held that the statute did not apply retroactively and dismissed the complaint.

This appeal followed. After the district court denied the government's motion to stay execution of judgment, we granted a stay pending this expedited appeal on the sole issue of whether section 1355(b) can be applied retroactively to this case. We now reverse.

II.

DISCUSSION

We review de novo the dismissal of an action on the pleadings. *See, e.g., Comer v. Cisneros*, 37 F.3d 775, 786 (2d Cir. 1994). Accordingly, we consider, in turn, the district court's conclusion that section 1355(b) should not apply to the instant case because of a general presumption against the retroactive application of legislation and, in addition, because such retroactive application in the instant case would raise a constitutional issue under the Ex Post Facto Clause.

A. Retroactivity

In determining whether a statute should apply to cases pending at the time of its passage, the courts are now guided by the Supreme Court's recent decision in *Landgraf*. In that case, the Supreme Court held that sections of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, creating a right to recover compensatory and punitive damages for certain violations of Title VII, and providing for a trial by jury where such damages are sought, did not apply to a case that was pending on appeal when the statute was enacted. In

particular, by reconciling two seemingly contradictory canons of judicial interpretation on the question of retroactivity, see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.") and *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974) ("[A] court is to apply the law in effect at the time it renders its decision . . . ."), *Landgraf* presented a method for determining whether a statute may be applied to conduct that took place before its enactment in the absence of clear congressional intent. Essentially, a court should not apply a statute to such conduct if a "new provision attaches new legal consequences to events completed before its enactment," *Landgraf*, 114 S. Ct. at 1499, and the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505. Because neither the language of section 1355(b) nor its legislative history provide any guidance as to whether it should apply to cases pending at the time of its passage, we now apply these criteria.

We conclude that section 1355(b), if applied in this case, would not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct. The claimants never had any right to property resulting from illegal gains, and their alleged drug smuggling and money laundering have always carried criminal penalties. One of the legal consequences of drug smuggling or money laundering is that the resulting illegal proceeds are subject to forfeiture to the government. *See, e.g.*, 18 U.S.C. § 981 (providing for civil forfeiture of property involved in

money laundering); 21 U.S.C at 881 (providing for civil forfeiture of property involved in or derived from violation of drug laws). "To the extent that [the underlying civil forfeiture statute] applies to 'proceeds' of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *United States v. Ursery*, 135 L. Ed. 2d 549, 116 S. Ct. 2135, 2148-49 (1996). The mere fact that people who commit crimes within the jurisdiction of the United States manage to secrete proceeds of those crimes out of the country does not mean that they enjoy any greater rights to those proceeds. Accordingly, it cannot be said that section 1355(b) ever created any new legal consequences or impaired any existing rights.[3] In these circumstances, retroactive application of the statute is permissible.

Section 1355(b), in any event, is not a forfeiture statute per se; it is a procedural statute. The *Landgraf* Court itself noted that procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Landgraf*, 114 S. Ct. at 1502. There are "diminished reliance interests in matters of procedure .... because rules of procedure regulate secondary rather than primary conduct." *Id.* (citations omitted). The secondary conduct here is the court's power — its jurisdiction — over the *res* located

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[3] In *Landgraf*, a case concerning a Title VII claim that arose before passage of the 1991 Civil Rights Act ("Act"), the Court noted that it would have been unfair to assess damages even though the underlying conduct had "been unlawful for more than a generation." *Landgraf*, 114 S. Ct. at 1506, n.35. The employer in *Landgraf* had never been liable for damages prior to the passage of the Act. In contrast, in the instant case, the claimants were at all relevant times on notice that any proceeds from money laundering or drug transactions within the jurisdiction of United States courts were subject to forfeiture.

overseas. Quintessentially procedural, jurisdiction statutes have often been accorded retroactive application. The Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 1501. "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *Id.* at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 60 L. Ed. 409, 36 S. Ct. 202 (1916), and *Republic Nat. Bank v. United States*, 506 U.S. 80, 100, 121 L. Ed. 2d 474, 113 S. Ct. 554 (1992) (Thomas, J, concurring)); see also *Hincapie-Nieto v. INS*, 92 F.3d 27, 29 (2d Cir. 1996)(applying *Landgraf*'s retroactivity analysis to jurisdiction-eliminating provision of the Antiterrorism and Effective Death Penalty Act of 1996).

In sum, the amendment to 28 U.S.C. § 1355 is not one of the class of statutes that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,' " *Landgraf*, 114 S. Ct. at 1499 (quoting *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)), nor does it affect transactions in which "predictability and stability are of prime importance." *Id.* at 1500. Accordingly, absent any constitutional infirmity, section 1355(b) may be applied in the instant case.

B. The Ex Post Facto Clause

The district court also concluded that the application of section 1355(b) to a case pending at the time of its enactment might raise problems under the Ex Post Facto Clause of the Constitution. While the Ex Post Facto Clause's proscription on the retroactive application of legislation is "applicable only to penal legislation," *Landgraf*, 114 S. Ct. at 1497, n.19 (emphasis added); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798), the district court determined that the application of section 1355(b) in the instant case may be "penal" inasmuch as assets not previously subject to forfeiture would now, by virtue of the 1992 amendment, be vulnerable to forfeiture. The court concluded that the Supreme Court's decision in *Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993), defining punishment in relation to civil forfeitures, "raises grave doubts concerning the constitutionality of retroactively applying 28 U.S.C. § 1355(b) — rendering subject to *in rem* forfeiture assets previously free from monetary punishment." The district court did not reach a definitive conclusion on this question because, it asserted, "clear Second Circuit precedent indicates that where retroactive application of a statute would raise 'even a spectre of a constitutional issue,' a court will choose to apply a statute prospectively in order to avoid that issue." (quoting *Louis Vuitton*, 765 F.2d at 971 (internal quotation marks and citation omitted)). A clearer expression of this principle is found elsewhere in Louis Vuitton — that "resolution of the constitutional issue need not be certain; there need only be a 'substantial doubt,' or an indication that the constitutional question is 'non-frivolous.' " *Louis Vuitton*, 765 F.2d at 971 (quoting *United States v. Security Indus. Bank*, 459 U.S. 70, 78, 74 L. Ed. 2d 235, 103 S. Ct. 407

(1982), and *In Re Ashe*, 712 F.2d 864, 865-66 (3d Cir. 1983), cert. denied, 465 U.S. 1024, 79 L. Ed. 2d 683, 104 S. Ct. 1279 (1984)). We turn, therefore, to the question of whether there is any "substantial doubt" that the retroactive application of section 1355(b) can survive a challenge under the Ex Post Facto Clause.

The district court's consideration of whether application of section 1355(b) in the instant case would be compatible with the Ex Post Facto Clause relied on the Supreme Court's analysis of civil forfeiture in *Austin*, in which the Court held that, under the Excessive Fines Clause of the Eighth Amendment, civil forfeiture constitutes "punishment" and that "the question is not . . . whether [civil] forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, 509 U.S. at 610. *Austin* conveyed the impression to many federal courts that civil forfeiture should also be considered "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment. *See, e.g., United States v. Idowu*, 74 F.3d 387, 393 (2d Cir.), cert. denied, 135 L. Ed. 2d 182, 116 S. Ct. 1888 (1996). That impression led the district court in the instant case to conclude that the forfeiture statutes at issue here were punitive, and therefore "criminal" or "penal" for purposes of the Ex Post Facto Clause as well.

More than three years after the district court rendered its judgment in this case, and just three weeks prior to oral argument before us, the Supreme Court handed down a decision, *Ursery*, 116 S. Ct. at 2135, that clarified and limited its prior holding in *Austin*. In holding that civil *in rem* forfeiture is not "punishment" for purposes of the Double Jeopardy Clause, the Court limited *Austin*'s holding to the Excessive Fines Clause.

Ursery, 116 S. Ct. at 2147, 2149.[4] Accordingly, *Ursery* has effectively repudiated the district court's impression that *Austin* "found civil forfeiture actions punitive in nature" and that retroactive application of such statutes could violate the Ex Post Facto Clause. The question remaining, therefore, is whether the district court's holding that retroactive application of section 1355(b) could violate the Ex Post Facto Clause survives the Supreme Court's decision in *Ursery*. If it can be shown that the relevant civil forfeiture statutes in the instant case are not penal or criminal, then there cannot be a "substantial doubt" as to their compatibility with the Ex Post Facto Clause.

As we have noted above, section 1355(b) is a procedural provision, designed to confer jurisdiction on the district courts to entertain forfeiture actions for property located overseas. The only way that section 1355(b) could possibly fall under the prohibition of the Ex Post Facto Clause would be if the underlying forfeiture statutes, 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6), could be classified as "criminal" or "penal." 18 U.S.C. § 981(a)(1)(A) provides, in pertinent part, that any property, real or personal, involved in a transaction or attempted transaction in violation of [money laundering and reporting statutes], or any property traceable to such property [shall be subject to forfeiture to the United States].

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[4] In distinguishing the holding of *Austin*, the Court in *Ursery* held that *Austin* "was decided solely under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment." *Ursery*, 116 S. Ct. at 2146. Similarly, there has never been an understanding that the Excessive Fines Clause and the Ex Post Facto Clause are "parallel" or "related."

21 U.S.C. § 881(a)(6) provides, in pertinent part, that all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter [shall be subject to forfeiture to the United States and no property right shall exist in them].

When examining whether *in rem* forfeiture proceedings were "criminal" or "civil," the Supreme Court in *Ursery* applied a two-part test: first, the Court considered congressional intent, and, second, it asked whether the forfeitures at issue were so punitive as to be considered "penal." *Ursery*, 116 S. Ct. at 2147. Although *Ursery* dealt with the Double Jeopardy Clause, the same analysis is equally applicable to a determination of whether the underlying statutes in the instant case are criminal or penal for purposes of the Ex Post Facto Clause. The *Ursery* Court's analysis is particularly relevant because two out of the three statutes analyzed in *Ursery* were the same as the underlying statutes in this case — namely, 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A).

In asking "whether Congress intended proceedings under 21 U.S.C. § 881, and 18 U.S.C. § 981, to be criminal or civil," the Court noted numerous procedural factors associated with forfeiture statutes that are indicators of whether the statutes were intended to be civil or criminal. *Ursery*, 116 S. Ct. at 2147-48 (noting that civil forfeitures are *in rem*, whereas criminal proceedings are in personam in nature; that lack of notice requirements and summary procedures typical of civil forfeitures are not usual in criminal proceedings; and that civil action burdens of proof are employed in civil

forfeitures, as opposed to the more onerous criminal burdens of proof used in criminal actions). "In sum, by creating such distinctly civil procedures for forfeitures under at 881 and at 981, Congress has indicated clearly that it intended a civil, not a criminal sanction." *Id.* at 2148 (alterations, internal quotation marks, and citations omitted).

In applying the second part of the test — "whether the proceedings are so punitive in fact as to 'persuade [the Court] that the forfeiture proceedings may not legitimately be viewed as civil in nature,' despite Congress' intent," *id.* at 2147 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (alterations in *Ursery*) — the Supreme Court found "little evidence . . . that forfeiture proceedings under 21 U.S.C. § 881(a)(6) and (a)(7), and 18 U.S.C. § 981(a)(1)(A), are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* at 2148. In so doing, the Court relied on its prior decisions in civil forfeiture cases. See *Various Items of Personal Property v. United States*, 282 U.S. 577, 581, 75 L. Ed. 558, 51 S. Ct. 282 (1931) ("The forfeiture is no part of the punishment for the criminal offense."); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234-35, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (*per curiam*) (distinguishing between civil forfeiture statutes and related criminal statute); *89 Firearms*, 465 U.S. at 366 (civil forfeiture under 18 U.S.C. § 924(d), providing for forfeiture of firearms involved in unlawful acts, is "not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature"). It found that "[21 U.S.C. § 881(a)(6), 881(a)(7), and 18 U.S.C. § 981(a)(1)(A)] are, in most significant respects, indistinguishable from those reviewed [in the three cases listed above]." *Ursery*, 116 S.

Ct. at 2148. In addition, the Court found the connection between these forfeiture statutes and criminal laws "insufficient to render the statutes punitive." *Id.* at 2149. Having found that the forfeiture statutes failed both parts of the test, the Court concluded that the statutes were "civil" for purposes of the Double Jeopardy Clause. We now conclude, on the basis of the analysis in *Ursery*, that 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) are not "penal" for purposes of the Ex Post Facto Clause and, in turn, that section 1355(b), the statute providing jurisdiction for their enforcement, cannot be "criminal" for purposes of that Clause.[5] Accordingly, there can be no "substantial doubt," or even the "spectre" of an unconstitutional issue, haunting the retroactive application of 28 U.S.C. § 1355(b).

III.

CONCLUSION

To summarize:

(1) Because we hold that the amendment to 28 U.S.C. § 1355 did not create any new liabilities, take away any vested rights, or impose new legal consequences for past conduct, we conclude that, absent any impediment posed

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[5] Our decision today, that retroactive application of 28 U.S.C. § 1355(b) in the instant action is not prohibited by the Ex Post Facto Clause, finds support in similar decisions in other circuits dealing with the Ex Post Facto Clause and civil forfeiture. *See, e.g., United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544-45 (5th Cir. 1987) ("[21 U.S.C. § 881(a)(6)] is . . . in both purpose and effect primarily a remedial, civil forfeiture provision, . . . the ex post facto clause of the Constitution does not apply to it."), cert. denied, 485 U.S. 976, 108 S. Ct. 1270, 99 L. Ed. 2d 481 (1988); *see also United States v. $ 5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1364 n.8 (9th Cir. 1986) (same, regarding 21 U.S.C. § 881(h)).

by the Ex Post Facto Clause, the jurisdictional amendment to 28 U.S.C. § 1355 — providing federal courts with jurisdiction over *res* located overseas — can be applied to civil forfeiture proceedings pending when the amendment became effective.

(2) Because this new provision, 28 U.S.C. § 1355(b), confers jurisdiction on the district court in the enforcement of civil forfeiture statutes that are not "penal" for purposes of Ex Post Facto Clause, its retroactive application would not raise a "substantial doubt" as to the constitutionality of section 1355(b) under the Ex Post Facto Clause.

Accordingly, the order of the district court granting the claimants' motion for judgment on the pleadings is reversed and the cause is remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
-against-
CERTAIN FUNDS CONTAINED IN ACCOUNT NOS. 600-306211-006, 600-306211-011 and 600-306211-014 LOCATED AT THE HONG KONG AND SHANG HAI BANKING CORPORATION, et al.,
Defendants.

AMENDED DECISION
MEMORANDUM AND ORDER
91-CV-3642 (DRH)

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HURLEY, District Judge

Currently before the Court are objections by Plaintiff United States of America ("the Government"), pursuant to Federal Rule of Civil Procedure 72(b), to the Report and Recommendation ("Report") of Magistrate Judge, now District Judge, Allyne Ross. In the Report, Judge Ross recommended that this Court grant the motion of Claimants Ko Sai-Man and Chiu Kim-Chun (collectively, "Claimants"), made pursuant to Federal Rule of Civil Procedure 12(c), for judgment on the pleadings. This Court on September 15, 1995 issued an Order adopting that part of Judge Ross's Report that concluded that Claimants had not waived any objections to jurisdiction. The September 15 Order also requested further briefing with respect to the remaining objections, in light of the Second Circuit's decision in *United States v. All Funds on Deposit in any Accounts Maintained in the Names of Heriberto Castro Meza or Esperanza Rodriguez de Castro*, 63 F.3d 148 (2d Cir. 1995) ("*Castro Meza*"), *aff'g* 856 F. Supp. 759 (E.D.N.Y. 1994) (Weinstein, J.), *petition for cert. filed*, 64 U.S.L.W. 3511 (Jan. 16, 1996) (No. 95-1134). For the reasons set forth below, the Court denies the Government's remaining objections and adopts Judge Ross's Report.

Background

The factual and procedural background of this action are presented thoroughly in Judge Ross's Report.[1] For the purpose of this Order, however, the Court briefly reviews certain pertinent history. The Government instituted this action *in rem* against the Defendant properties in September, 1991. The Government contends that the Defendant properties, which include "various bank accounts, parcels of real property, stock, and personalty, all located in Hong Kong and valued at approximately $1.5 million, are subject to forfeiture to the United States as proceeds of narcotics activity," pursuant to 18 U.S.C. § 981(a)(1)(A). (Report at 5.) At the time this action was commenced, Claimants were not (and they are not currently) Defendants in a related criminal action in the Eastern District of New York. Further, Claimants were not present in this district, either at the time that the Complaint was filed or thereafter. Upon the filing of the Complaint, warrants *in rem* were issued against the Defendant properties and each Defendant *in rem* was served by the Royal Hong Kong Police Force. (*Id.* at 7.)

Claimants, through United States counsel, filed this motion for judgment on the pleadings, on the ground that the Court lacked *in rem* jurisdiction. Specifically, Claimants contended that this Court lacked *in rem* jurisdiction because the Defendant properties are located outside of the United States. In response, the Government advanced three arguments. First, the Government contended that 28 U.S.C. § 1355(b)(2), as amended subsequent to the initiation of this action, provided a jurisdictional basis for forfeiture of a *res* located in a foreign country, and that this section should be applied

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[1] This opinion assumes familiarity with Judge Ross's Report.

retroactively to confer *in rem* jurisdiction over the Defendants. Second, the Government contended that, even if the new statutory provision were not applied retroactively, the Court had jurisdiction over the action under previously existing law. Finally, the Government contended that Claimants waived any objection to jurisdiction, as they had filed claims to the Defendant properties without objecting to jurisdiction in their initial submissions to the Court.

Judge Ross concluded that Claimants had not waived any objections to jurisdiction. (*See* Report at 15-29.) She also concluded that "when this action began in September 1991, no federal forfeiture statute authorized *in rem* jurisdiction over assets located outside the territorial boundaries of the United States." (*See* Report at 29, 48-60.) Finally, Judge Ross rejected the Government's argument that the 1992 amendments to 28 U.S.C. § 1355 could be applied retroactively to confer *in rem* jurisdiction in this action, (*see* Report 29-48), and recommended that the Court grant Claimants' motion for judgment on the pleadings.

For the reasons discussed below, the Court, like Judge Ross, finds that when this suit was commenced, no federal statute authorized the exercise of *in rem* jurisdiction in this action. Further, the Court agrees with Judge Ross that the 1992 amendments to 28 U.S.C. § 1355 do not apply retroactively. Moreover, the Court finds that the Second Circuit's decision in *Castro Meza* does not alter these conclusions.

Discussion

Before turning to the merits of the Government's objections, the Court first considers the relevant standard of review.

I. Standard of Review

In considering a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), the Court must "view the pleadings in the light most favorable to, and draw all inferences in favor of, the nonmoving party." *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994) (quoting *Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989)). The Court should not dismiss the Complaint "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)), *cert. denied*, 115 S. Ct. 73 (1994).

When a motion has been referred to a Magistrate Judge, Federal Rule of Civil Procedure 72(b) instructs the District Court to make a "de novo determination upon the record . . . of any portion of the Magistrate Judge's disposition to which specific objection has been made, in accordance with this rule." Fed. R. Civ. P. 72(b). Further, the Court may accept any portion of the disposition of the Magistrate Judge to which no objection has been made, provided that there is no clear error on the face of the record. Fed. R. Civ. P. 72 advisory committee note (citing *Campbell v. United States Dist. Ct.*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879, 42 L. Ed. 2d 119, 95 S. Ct. 143 (1974)). After conducting its review, the district court may "accept, reject, or modify the recommended decision." *Id.*

With these standards in mind, the Court considers the Government's objections to Judge Ross's Report. For ease of reference, pertinent portions of Judge Ross's Report are set forth below. The Government's objections to the Report follow. First, the Court reviews the Government's objection to Judge Ross's finding that the

governing law did not permit the Court to assert *in rem* jurisdiction over the Defendant assets prior to the 1992 amendments to 28 U.S.C. § 1355 ("1992 amendments"). Second, the Court considers the Government's challenge to Judge Ross's conclusion that the 1992 amendments do not operate retroactively to authorize the Court to assert *in rem* jurisdiction in this action. Finally, the Court addresses the submissions by the parties that address the significance of *Castro Meza*.

II. Judge Ross's Report and Recommendation

A. Governing law at the Time the Action was Commenced

The facts of this case presented issues at the time it was commenced with which numerous district courts had struggled — namely, whether, in a civil forfeiture action, a district court could issue Process *in rem*, and exert *in rem* jurisdiction over, assets located outside the territorial boundaries of the district court. (*See* Report at 12.) Further, Judge Ross addressed whether, even assuming a district court was authorized to issue extraterritorial process *in rem* and to secure *in rem* jurisdiction over assets located outside a district court's territorial boundaries, that authority extended to assets located outside of the United States. (*Id.*)

Judge Ross, in her exhaustive Report, set forth the applicable statutes and case law governing subject matter jurisdiction, venue and service of process *in rem*, in civil forfeiture actions before the 1992 amendments. (*See* Report 48-59.) Briefly put, when this action was commenced in 1991, the pertinent statutes governing civil forfeiture proceedings provided that venue in civil forfeiture proceedings was proper in the district in

which: i) the property sought to be forfeited was found, *see* 28 U.S.C. § 1395(b); ii) a related criminal prosecution against the claimant was brought, *see* 18 U.S.C. § 981(h) ("Section 981(h)") and 21 U.S.C. § 881(j) ("Section 881(j)") (identical language conferring venue in civil forfeiture actions); or iii) the claimant-defendant owning such property was found.[2] *See id.*

Finally, the civil forfeiture statutes authorized service of process *in rem* in accordance with the Supplemental Rules Relating to Admiralty and Maritime Actions. *See* 21 U.S.C. § 881(b) and 18 U.S.C. § 981(b)(2). Under Supplemental Rule E(3)(a), a district court is authorized to issue process *in rem* to be served only in the district in which it sits. Suppl. R. Ad. M. E(3)(a). The Supplemental Rules also provide for service of process *in rem* pursuant to the Federal Rules of Civil Procedure, to the extent that such service would not be inconsistent with the Supplemental Rules. Suppl. R. Ad. M. A. Federal Rule of Civil Procedure 4 ("Rule 4") provides for extraterritorial and international service of process, but only where independently authorized by a state or federal statute which renders a defendant amenable to service. *See* Fed. R. Civ. P. 4(e), (f).

In the Report, Judge Ross reviewed a line of cases that provided that a district court could not assert *in rem* jurisdiction over assets located outside that court's jurisdiction because the statutes governing civil forfeiture did not expressly authorize the issuance of extraterritorial process *in rem* in order to secure that jurisdic-

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[2] Section 981(h) and Section 881(j) expanded venue in rem civil forfeiture actions, which, like a court's authority to issue process in rem, traditionally had been limited to the district in which the *res* is located. *See United States v. All Funds on Deposit*, 856 F. Supp. 759 (E.D.N.Y. 1994) (Weinstein, J.), aff'd, 63 F.3d 148 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3511 (Jan. 16, 1996) (No. 95-1134).

tion. (*See* Report at 51-53 (citing, *inter alia*, *United States v. Contents of Accounts Nos. 3034504504 and 144-17143*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993) and *United States v. Real Property Located at 11205 McPherson Lane*, 754 F. Supp. 1483 (D. Nev. 1991), *aff'd* 32 F.3d 573 (9th Cir. 1994), *cert. dismissed*, 115 S. Ct. 536 (1994)).) Judge Ross also considered a conflicting line of cases that held that the venue provisions contained in 21 U.S.C. § 881 and 18 U.S.C. § 981 provided implied authority for a district court to issue process pursuant to the pertinent provisions of Rule 4 against property located outside that court's district. (*See* Report at 53-56 (discussing, *inter alia*, *United States v. All Stock of All Classes Issued By R-Jo Trucking Corp.*, 1992 WL 79319 (E.D.N.Y. Apr. 2, 1992) (Nickerson, J.), *United States v. Premises Known as Lots 50 & 51*, 681 F. Supp. 309 (E.D.N.C. 1988), and *United States v. One 1974 Cessna Model 310R Aircraft*, 432 F. Supp. 364 (D.S.C. 1977)).)

As to the pre-amendment law governing *in rem* forfeiture actions in which the defendant assets were located outside the district court's territorial boundaries, Judge Ross concluded:

> Contrary to the government's contention, not even the latter line of authorities, which interpret the pre-October 1992 statutory framework governing civil *in rem* forfeiture proceedings as implying not only enhanced venue, but also nationwide jurisdiction and authorization for nationwide service of process, supports the position that the government advances here. First, each of those authorities founded their jurisdictional analysis upon an existing venue

> statute and reasoned that the language of the statute, conferring venue on the district court in an *in rem* forfeiture proceeding, supported the inference that Congress necessarily intended to confer territorial jurisdiction as well. In *R-Jo, Lots 50 & 51*, and *All Funds*, where the criminal prosecutions occurred in the same court as the forfeiture proceedings, each court was satisfied that it had been granted territorial jurisdiction because the applicable venue statute had expressly granted it venue. Similarly, in *Cessna*, the court held that "the venue statute contained in at 1395 is jurisdictional in nature . . . and it alone determines where a forfeiture may properly be brought." *Cessna*, 432 F. Supp. at 368.
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> Here, by contrast, there is no statute conferring venue on this court in this proceeding. The *res* is not located in the Eastern District of New York, as required by 28 U.S.C. § 1395(b). No claimant is located in the Eastern District of New York nor was any claimant ever prosecuted here as required by 21 U.S.C. § 881(j) and 18 U.S.C. § 981(h). . . . Absent any venue statute applicable to the instant case, there is no basis to "imply" territorial jurisdiction under the authorities the government cites.

(Report at 56-57.) Thus, the absence of an applicable venue statute when this action was commenced was the

basis of Judge Ross's conclusion that the Court did not enjoy any "implied" authority to issue extraterritorial service of process *in rem* and, thus, to secure *in rem* jurisdiction over Claimants' assets. (*Id.* at 57.)

Further, Judge Ross found that "[n]o court has found authorization for service of process in an *in rem* civil forfeiture proceeding outside the territorial borders of the United States." (*Id.* at 58.) Judge Ross's review of the case law revealed only one case, *United States v. United States Funds in the Amount of $3,035,648*, Civ. 91-217E, 1991 U.S. Dist. LEXIS 16248 (W.D.N.Y. Nov. 4, 1991), in which the court granted the claimants' motion to dismiss an *in rem* civil forfeiture suit against assets located in Hong Kong. (Report at 58-59.) Noting that the court in *$3,035,648* found that "the government had produced no persuasive authority for the proposition that a United States District Court can order property located in a foreign country to be forfeited to the United States[,]" *see* 1991 U.S. Dist. LEXIS 16248, at *16, Judge Ross similarly concluded that "there exists no statutory or other precedent supporting *in rem* jurisdiction over Claimants' Hong Kong assets in this lawsuit." (Report at 59.)

B. 1992 Amendments to 28 U.S.C. § 1355

In October 1992, Congress amended 28 U.S.C. § 1355, broadening venue in civil forfeiture proceedings, authorizing nationwide service of process, and providing for venue in civil forfeiture actions directed at foreign-based property. The 1992 amendments, contained in section 1521 of the Anunzio-Wylie Anti-Money Laundering Act (Anunzio-Wylie Act), Pub. L. No. 102-550, 106 Stat. 4062, provide in pertinent part:

(b)(1) A forfeiture action or proceeding may be brought in —

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred . . .

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

(c) In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction . . . .

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

28 U.S.C. § 1355(b)-(d). In opposition to Claimants' motion, the Government argued that the 1992 amendments should be applied retroactively as they simply "clarified" existing law. (*See* Report at 14.) Additionally, the Government adopted the reasoning of Justice Thomas's concurring opinion in *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 113 S. Ct. 554, 565, 121 L. Ed. 2d 474 (1992), in which Justice Thomas advanced the view that the newly enacted 28 U.S.C. § 1355(c), *see supra* at 11, not at issue in this case, should apply retroactively.[3]

In an extensive analysis, Judge Ross first considered the language of the statute itself and concluded that it shed little light on the question of prospective or retrospective application, providing only that the statute "shall apply on the date of enactment." (*See* Report at 30.) Further, "although sections in other subtitles of the Anunzio-Wylie Act do provide for special dates of effectiveness or applicability, none of these raise any inference of Congressional intent concerning the prospectivity or retroactivity of the remaining provisions of the Act." (*Id.* at 31 (footnote omitted).)

Judge Ross then reviewed the legislative history of the Anunzio-Wylie Act. (*See* Report at 33.) Noting that references to retroactivity contained in a predecessor version of the same statute had been eliminated, she concluded that "[a]t the very least, this suggests that Congress was aware of this issue and did not intend to address it." (*See* Report at 33.) Judge Ross also found

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[3] The Court in *Republic Nat'l Bank of Miami* held that "in an in rem forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the *res* from the District." 113 S. Ct. at 559-60 (footnote omitted). Noting that the addition of section (c) to 28 U.S.C. § 1355 addressed that very issue, the Court nonetheless expressly declined to "interpret that statute or determine the issue of its retroactive application to the present case." *Id.* n.5.

that under Second Circuit law, there exists a presumption in favor of applying statutes prospectively. (Report at 34-37 (relying on, *inter alia*, *Butts v. City of New York Dep't Hous.*, 990 F.2d 1397 (2d Cir. 1993)[4] ; *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990)).) She rejected the Government's arguments that the 1992 amendments merely "clarified" ambiguities in previously existing law concerning *in rem* civil forfeiture proceedings, because prior to the 1992 amendments, no statute conferred the jurisdiction at issue in this action. (Report at 37.)

Further, Judge Ross rejected the Government's position that the 1992 amendments should retroactively confer jurisdiction because statutes enlarging jurisdiction govern pending suits. Judge Ross found that the 1992 amendments present a "first codification" of a district court's authority to exert *in rem* jurisdiction over assets located outside the district and, indeed, in a foreign country, and that retroactive application is "wholly irreconcilable with the principle that jurisdiction is determined at the time of the commencement of suit." (*Id.* at 42 (relying on *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir.), *cert. denied*, 449 U.S. 1080, 66 L. Ed. 2d 804, 101 S. Ct. 863 (1980)).)

Finally, Judge Ross found that "[w]hile the presumption favoring prospective application of newly enacted

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[4] In *Butts*, the Second Circuit analyzed whether provisions of the 1991 Civil Rights Act ("the Act") applied retroactively. 990 F.2d at 1397. "[T]o determine the retroactivity question, we must examine the Act's language, its legislative history, the significance of the two sections where prospectivity is specified in relation to the Act as a whole, and view the Act in light of applicable presumptions." *Id.* at 1404 (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 112 S. Ct. 2102, 2107-09, 119 L. Ed. 2d 308 (1992)).

civil statutes itself supports a prospective application of at 1355, the 'cardinal principle' requiring the adoption of a construction that avoids constitutional questions squarely dictates a prospective construction of at 1355 in this case because retroactive application of the statute would raise grave constitutional questions concerning the *Ex Post Facto* Clause, U.S. Const. Art. I, at 9, cl. 3." (Report at 42-43.) Specifically, Judge Ross relied on *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971 (2d Cir. 1985):

> Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," or an indication that the constitutional question is "non-frivolous." "Even the spectre of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief.

(*See* Report at 43.)

Judge Ross found support in *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), for her conclusion that retroactive application of the statute raised constitutional questions. In *Austin*, the Supreme Court found that the Excessive Fines Clause of the Eighth Amendment applies to *in rem* civil forfeiture proceedings, which are punitive in nature. (*See* Report at 45.) Judge Ross concluded that

> [t]he Supreme Court's recent pronouncements in *Austin*, in light of the *Ex Post Facto* Clause's language, raise grave doubts concerning the con-

> stitutionality of retroactively applying 28 U.S.C. § 1355(b) — rendering subject to *in rem* forfeiture assets previously free from monetary punishment — to cases pending at the time of its enactment. Accordingly, under the "cardinal principle" of statutory construction applied in *Vuitton*, mandating an interpretation that avoids constitutional issues without deciding them, it is incumbent upon the court to deny§ 1355(b) retrospective application.

(Report at 47-48 (footnote omitted).)

Having concluded that the 1992 amendments should not apply retroactively to confer *in rem* jurisdiction in this action, and that the law governing this action at its commencement did not provide for such jurisdiction, *see supra* at 6-10, Judge Ross recommended that the Court grant Claimants' motion for judgment on the pleadings. The Court now turns to the Government's objections to the Report.

III. The Government's Objections

As an initial matter, the Court notes that the Government takes issue with Judge Ross's consideration, or purported lack thereof, of certain submissions outside the pleadings that were offered by the Government in opposition to Claimants' motion for judgment on the pleadings. Specifically, the Government contends that:

> [i]n rendering her Report, Magistrate Judge Ross curiously gave short shrift to the facts pleaded by the Government concerning Ko Sai-Man's heroin trafficking and drug money laundering

> activities in the complaint, as well in the declarations submitted by the Government, in opposition to claimants' motion. Indeed, one searches in vain the Report for any reference to the documentary and testimonial evidence supporting the Government's assertions that Ko Sai-Man was a major heroin trafficker and drug money launderer set forth in the First and Second Weinstein Declarations.

(Pl.'s Jan. 14, 1994 Mem. at 24-25.) Additionally, the Government states that "[i]n a Rule 12(c) motion for judgment on the pleadings, the *record* is viewed in a light most favorable to, and all reasonable inferences are drawn in favor of, the nonmoving party[.]" (*Id.* at 24 (emphasis added).) The Court finds that this objection is without merit.

Federal Rule of Civil Procedure 12(c) ("Rule 12(c)") provides:

> [i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(c).

As previously noted, *see supra* at 5, in considering a motion for judgment on the pleadings, the Court must "view the *pleadings* in the light most favorable to, and draw all inferences in favor of, the nonmoving party." *Davidson*, 32 F.3d at 29 (2d Cir. 1994) (quoting

Madonna, 878 F.2d at 65) (emphasis added). If a party presents matters outside of the pleadings, however, the Court has two options. The Court may consider the matters outside the pleadings and convert the motion to one for summary judgment, *see* Rule 12(c), or the Court may exclude those materials and decide the motion on the basis of the pleadings. *See id.*

According to Judge Ross's Report, matters outside the pleadings that were submitted by the Government were not considered. (*See* Report at 14.) Specifically, according to the Report:

> [Claimants] further urge that even were the new statutory provisions to be applied retroactively, these provisions cannot confer jurisdiction on this court because the government has failed to allege sufficient contacts to satisfy the Constitutional due process requirement . . . . In an effort to persuade the court that the government could adduce evidence satisfying the Constitutional minimum contacts test, the government proffered additional evidence in the form of declarations and deposition testimony. . . . Because, as detailed below, the pertinent 1992 amendments to at 1355 should not be applied retroactively in this case, it is not necessary to reach the propriety or sufficiency of the government's recent evidentiary submission.

(*Id.* at 14.)

Judge Ross, thus, acknowledged the Government's submission of matters outside the pleadings and excluded them from her consideration of Claimants'

motion. Like Judge Ross, this Court concludes that the 1992 amendments do not apply retroactively, *see infra* at 27-37, and, therefore, the Court does not consider matters outside the pleadings in considering Claimants' motion for judgment on the pleadings.[5]

A. Objections Regarding Governing law Prior to the 1992 Amendments

The Government objects to Judge Ross's conclusion that prior to the 1992 amendments, no federal statute conferred *in rem* jurisdiction in this action. First the Government argues that Judge Ross mistakenly accepted the Claimants' view that prior to 1992, the assets subject to forfeiture were required to be physically located in this district. (*See* Pl.'s Jan. 14, 1994 Mem. Supp. at 38.) The Government relies on numerous cases in which *in rem* jurisdiction was found appropriate even where the

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[5] The Government has continued to rely on matters outside the pleadings, in particular, the First and Second Weinstein Declarations, in its submissions to date. (*See, e.g.*, Pl.'s Jan. 14, 1994 Mem. at 2-10; Pl.'s Mar. 18, 1994 Repl. Mem. at 22-23.) On this motion for judgment on the pleadings, the Court does not consider these submissions.

Parenthetically, even if the Court were to consider the matters outside the pleadings that were submitted by the Government, thereby converting the instant motion to a motion for summary judgment, the Government would not prevail. The "documentary evidence supporting the Government's assertions that Ko Sai-Man was a major heroin trafficker and drug money launderer set forth in the First and Second Weinstein Declarations," (*see* Pl.'s Jan. 14, 1994 Mem. at 25), would not provide the proper predicate for venue under the law applicable to this action, *i.e.*, that the property sought to be forfeited is located in this district, *see* 28 U.S.C. § 1395(b), that Claimants are located in this district, or that Claimants were defendants in a related criminal prosecution in this district. *See* 18 U.S.C. § 981(h); 21 U.S.C. § 881(j).

res was not physically located within the district. (*See id.* at 38-42 (citing *United States v. United States Currency in the Sum of $393,967*, 775 F. Supp. 43, 49 (E.D.N.Y. 1991); *United States v. All Stock of All Classes Issued By R-Jo Trucking Corp.*, 1992 WL 79319 (E.D.N.Y. Apr. 2, 1992) (Nickerson, J.); *United States v. All Funds on Deposit*, 767 F. Supp. 36, 39 (E.D.N.Y. 1991) (Spatt, J.); *United States v. Premises Known as Lots 50 & 51*, 681 F. Supp. 309 (E.D.N.C., Ral. Div. 1988); *United States v. 1974 Cessna Model 310R Aircraft*, 432 F. Supp. 364, 368 (D.S.C. 1977)).) Further, the Government argues that public policy supports the assertion of *in rem* jurisdiction even where the *res* is located outside the district court's jurisdiction. (Report at 44-46 (citing, *inter alia*, *Lots 50 & 51*; *R-Jo Trucking*; *All Funds on Deposit*; Fed. R. Civ. P. 4(i)(C)(E)).) Moreover, the Government argues that Judge Ross erroneously relied on *United States v. $3,035,648.50*, 1991 U.S. Dist. LEXIS 16248 (W.D.N.Y. Nov. 4, 1991) in concluding that the Court does not have *in rem* jurisdiction over the foreign Defendant assets in this action.

Like Judge Ross, this Court finds that prior to 1992, no federal statute expressly conferred *in rem* jurisdiction over assets located outside of the territorial boundaries of a district in which a court sits. Notwithstanding the broad grant of subject matter jurisdiction and venue conferred upon district courts pursuant to the civil forfeiture laws, the express language of the applicable process provision, which limited a court's authority to issue process *in rem* to within the confines of its respective district, *see* Suppl. R. Ad. M. E(3)(a), proved to be a gap in the scope of civil forfeiture jurisdiction with which various courts grappled.

As the Second Circuit has stated:

> Prior to 1992, § 1355 simply provided that district courts had subject matter jurisdiction over forfeiture proceedings commenced pursuant to the laws of the United States. It did not, however, authorize a district court to issue process against property not located within its district. This limitation hindered the effectiveness of the forfeiture laws, as some courts concluded that district courts lacked *in rem* jurisdiction in actions where the property was located outside the district where the forfeiture action was brought. *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 983 (3d Cir. 1992) . . . .

Castro Meza, 63 F.3d at 151. *Compare R-Jo Trucking*, 1992 WL 79319 (court may assert *in rem* jurisdiction in civil forfeiture action even where *res* is not in district), and *Lots 50 & 51*, 681 F. Supp. 309 (same) *with United States v. Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993) (district court did not have *in rem* jurisdiction over property outside of district because service of process could not be effected), and *United States v. Real Property Located at 11205 McPherson Lane*, 754 F. Supp. 1483 (D. Nev. 1991) (same).

Put another way, even assuming a district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1355 or 18 U.S.C. § 1345, and proper venue pursuant to either Section 881(j) or Section 981(h), there was no statute that expressly authorized a district court to issue process directed at property outside the boundaries of that

court's respective district. In this Circuit, district courts found that the broad grant of subject matter jurisdiction and venue in civil forfeiture cases would be rendered meaningless if district courts were precluded from issuing such process.

In *R-Jo Trucking*, stock and proprietary leases evidencing ownership of property located in the Southern District of New York and in Florida were seized pursuant to a warrant *in rem*. 1992 WL 79319, at *2. The claimant in *R-Jo Trucking* asserted that the court lacked *in rem* jurisdiction over the defendant properties because they were not within the court's district. *Id.* at *3. Noting that "numerous courts" had held that the civil forfeiture provisions give a district court jurisdiction over a *res* located outside the court's district, *id.* (citing *United States v. All Funds on Deposit in the Account of Certain Individuals*, No. 91-0881, slip op. at 4 (E.D.N.Y. Oct. 30, 1991) and United States v. One 1974 Cessna Model 310R Aircraft, 432 F. Supp. 364, 368 (D.S.C. 1977)), Judge Nickerson found that Section 981(h) "makes clear that the jurisdictional provisions of 28 U.S.C. section 1355 were to be read to encompass forfeiture of a *res* found outside the district where it is located . . . [in that a] forfeiture proceeding may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought." *Id.* Judge Nickerson found that it would be nonsensical for Congress to provide nationwide jurisdiction and venue in civil forfeiture proceedings yet limit the authority to issue process *in rem* to within the district, *id.* at *3-4, and agreed with the court in *Lots 50 & 51*, 681 F. Supp. 309 (E.D.N.C. 1988), that nationwide service of process was implied under the Section 881(j) venue provision. *Id.* at *4. Moreover, he concluded that the implication

applied equally under Section 981(h), the language of which mirrors Section 881(j). *Id.*

In *Lots 50 & 51*, the government brought a forfeiture action in North Carolina against property located in the Southern District of Florida. 681 F. Supp. at 310. The claimants brought a motion to dismiss for lack of *in rem* jurisdiction on the ground that the extraterritorial service of process *in rem* was defective because the *res* was outside of the district. *Id.* The government argued in that action that subject matter jurisdiction was conferred under 28 U.S.C. § 1395, 1355, and that venue was proper under Section 881(j). *Id.* at 310-11. The *Lots 50 & 51* court considered the problem posed by the limited express authority to issue process, namely, "how did Congress intend process to be effected, i.e., did it intend that the reach of process would coextend with this expanded venue or did it simply fail to consider the impact of then current limitations on the reach of process in forfeiture *in rem* actions?" *Id.* at 313. Concluding that the failure of Congress to expressly provide for nationwide service of process in forfeiture proceedings brought pursuant to 21 U.S.C. § 881 should not frustrate the purpose of enacting Section 881(j), the *Lots 50 & 51* court held that nationwide service of process was authorized. *Id.* at 314.

The conclusions reached by the courts in *R-Jo Trucking* and *Lots 50 & 51*, that nationwide service of process was to be implied to effectuate the enhanced venue conferred to district courts under the venue-for-forfeiture statutes were shared by other courts as well. For example, in *United States v. One 1974 Cessna Model 310R*, 432 F. Supp. 364 (D.S.C. 1977) the court stated that:

> [w]hile the Court is acutely aware of the distinctions between jurisdiction and venue, in this particular instance,

> the venue statute controls territorial jurisdiction in that it represents an effective statutory limitation on the district court's power to hear the matter in hand.

432 F. Supp. at 368.

In contrast, the Third Circuit refused to find implied authority for nationwide service of process in the Section 981(h) and Section 881(j) venue provisions. *See United States v. Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1580. In *Accounts Nos. 3034504504 and 144-07143*, the government brought a civil forfeiture proceeding directed at property located in the Southern District of New York. The government brought the proceeding in the District of New Jersey, the same district in which a related criminal action had been brought against the claimant. 971 F.2d at 975-76. The Third Circuit examined the government's assertion that a district court's authority to issue extraterritorial process *in rem*, and thus assert *in rem* jurisdiction over the defendant property, was limited only by the forfeiture venue provisions. *Id.* at 980.

Essentially, the government in *Accounts Nos. 3034504504 and 144-07143* argued the same rationale as that adopted by Judge Nickerson in R-Jo Trucking, namely, that the expanded venue conferred to district courts under Section 981(h) and Section 881(j) provided implied statutory authorization for extraterritorial service of process in order to effectuate the broad grant of venue found in those provisions. *Id.* at 981. The Third Circuit, however, refused to find such implied authority. "In the absence of clear evidence in the legislative history that Congress intended to allow nationwide service of process when it enacted section 981(h), we do not think that we can imply authorization for nationwide

service from section 981(h)'s liberalized view on venue." *Id.* This literal reading of the applicable forfeiture statutes was shared by other courts. *See United States v. 11205 McPherson Lane*, 754 F. Supp. 1483, 1486 (D. Nev. 1991) ("[T]he legislative history offers no evidence that Congress intended 881(j) to extend a court's power of process[.]").

To be sure, as the Government argues in this case, numerous courts had found, prior to the 1992 amendments, that the venue provisions contained in Section 881(j) and Section 981(h) provided implied authority for a district court to issue process to secure *in rem* jurisdiction over assets located outside the district court's territorial boundaries. *See, e.g., R-Jo Trucking, supra* at 21-22. However, as Judge Ross correctly concluded, in each case that so found, the action was properly venued pursuant to a then-existing venue statute.[6] *See, e.g., United States v. Currency in the Sum of $393,967*, 775 F. Supp. 43 (E.D.N.Y. 1991) (claimant a defendant in related criminal proceeding in same district); *United States v. All Funds on Deposit*, 767 F. Supp. 36 (E.D.N.Y. 1991) (Spatt, J.) (same); *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575, 1578 (N.D.Ga. 1993) ("This Court agrees with the Government that amended at 1355 shows that Congress intends district courts to have jurisdiction over a forfeiture action *whenever venue is properly had under a forfeiture*

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[6] In support of its policy basis for commencing this action in this district, the Government relies on the view, in dictum, of the *Lots 50 & 51* court that an unindicted co-conspirator should also be subject to jurisdiction in the district in which illegal activity has taken place. (See Pl.'s Jan. 14, 1994 Mem. at 45 (citing *Lots 50 & 51*, 681 F. Supp. at 312).) The Court notes, however, that in *Lots 50 & 51*, unlike the case at bar, a claimant therein was a defendant in a related criminal prosecution in the same district. See *Lots 50 & 51*, 681 F. Supp. at 310-12.

statute such as 18 U.S.C. § 981." (emphasis added); *Lots 50 & 51*, (claimants were criminal defendants in related criminal proceeding); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994) (forfeiture action brought in district where criminal charges pending against claimant were brought).

In contrast, in the case at bar, Judge Ross found that none of the statutory bases for venue that existed at the time this action was commenced has been satisfied — namely, that the Defendant property is located in this district, *see* 28 U.S.C. § 1395, or that the claimants are present here or are defendants in a related criminal action pending in this district. *See* Section 981(h) and Section 881(j). Where the Government has asserted that venue is proper in this district, it has done so in reliance on the "acts or omissions" basis *added* by the 1992 amendments.[7] (*See, e.g.*, Pl.'s Jan. 8, 1993 Mem. at 15-16; *see also* Pl.'s Jan. 14, 1994 Mem. at 37.) However, because this Court holds that the 1992 amendments are not retroactive, the "acts or omissions" that the Government asserts occurred, even if established, cannot afford a proper basis for venue as of the time this action was commenced. Absent venue, *in rem* jurisdiction cannot properly be asserted.

Therefore, based on a review of governing law regarding the jurisdictional requirements in civil forfeiture

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[7] Additionally, the Government's arguments concerning proper venue have focussed on whether Ko Sai-Man's activities have a sufficient "nexus" to the Eastern District of New York. (*See, e.g.*, Pl.'s Mar. 18, 1994 Mem. at 21-23.) These assertions address the Claimants' argument that even if the 1992 amendments were applied retroactively, there were insufficient "contacts" between the Claimants' activities and this District. However, as this Court has adopted Judge Ross's conclusion that the 1992 amendments do not apply retroactively, *see infra* at 37, arguments in this regard are not addressed.

actions prior to 1992, the Court, like Judge Ross, concludes that *in rem* jurisdiction over the Defendant assets in Hong Kong does not lie in this action. Despite the accuracy of the Government's position that the traditional "no res, no jurisdiction" rule had been abrogated even prior to the 1992 amendments, *see, e.g., R-Jo Trucking*, discussed *supra* at 21-22, the Government cannot benefit from this expansion to the extent urged. In sum, a statutory basis for venue and thus, a necessary underpinning for this Court's authority to issue process *in rem* on extraterritorial assets, was absent when this action was commenced.

B. Retroactivity

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 128 L. Ed. 2d 229, 114 S. Ct. 1483, 1497 (1994). Thus stated the Supreme Court recently while determining whether provisions of the Civil Rights Act of 1991, creating a right to recover compensatory and punitive damages for certain Title VII violations, applied to cases pending on appeal when the Act was enacted.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress had expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have

> retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent governing such a result.

114 S. Ct. at 1505.

With this presumption against retroactivity in mind, the Court considers the Government's objections to Judge Ross's conclusion that the 1992 amendments do not apply retroactively, viz: 1) that Judge Ross incorrectly interpreted relevant legislative history and Congressional intent of the amendments; 2) the *ex post facto* clause does not apply to this action; and 3) case law supports the retroactive application of the 1992 amendments. The Court considers each objection in turn.

1. Legislative History

First, the Government asserts that Judge Ross incorrectly interpreted the legislative history of the 1992 amendments to 28 U.S.C. § 1355. (*See* Pl.'s Jan. 14, 1994 Mem. at 27.) In particular, the Government relies on the following passage from the August 1991 Congressional Record:

> Subsection (b)(1) thus makes clear that these venue-for-forfeiture statutes also give the court in the relevant district jurisdiction over the defendant property even if the property was not seized in that district and is not located there. *See Premises Known as*

Lots 50 & 51, 681 F. Supp. at 31-13

. . . .

Subsection (b)(2) addresses a problem that arises whenever property subject to forfeiture under the laws of the United States is located in a foreign country. As mentioned, under current law, it is probably no longer necessary to base *in rem* jurisdiction on the location of the property if there have been sufficient contacts with the district in which the suit is filed. *See United States v. $10,000 in U.S. Currency, supra.* No statute, however, says this, and the issue has to be repeatedly litigated whenever a foreign government is willing to give effect to a forfeiture order issued by a United States court and turn over seized property to the United States if only the United States is able to obtain such an order.

Subsection (b)(2) resolves this problem by providing for jurisdiction over such property in the United States District Court for the District of Columbia, in the district court for the district in which any of the acts giving rise to the forfeiture occurred, or in any other district in which venue would be appropriate under a venue-for-forfeiture statute. If the acts giving rise to the forfeiture occurred in more than one district, as would commonly occur in a money laundering case, for example, jurisdic-

> tion would lie in any of those districts or in the District of Columbia.[8]

(Pl.'s Jan. 14, 1994 Mem. at 27 (quoting 137 Cong. Rec., daily ed. Aug. 2, 1991, at p. S12238) (footnote inserted).)

Further, the Government relies on the following statement by Senator D'Amato, one of the sponsors of the amendments:

> Although they do not say so explicitly, those statutes apply not only to venue but also to jurisdiction, since it would make no sense for Congress to provide for venue in a district without intending to give a court in that district jurisdiction as well. . . .
>
> Subsection (b)(1) thus makes clear these venue-for-forfeiture statutes also give the court in the relevant district jurisdiction over the defendant property even if the property was not seized in that district and is not located there.

(Pl.'s Jan. 14, 1994 Mem. at 32 (quoting 137 Cong. Rec., daily ed., Aug. 2, 1991, at S12238).)

According to the Government, the above-quoted remarks by Senator D'Amato, in conjunction with other pertinent sections of the legislative history of the 1992 amendments, *see supra* at 28-29, clearly show that the

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[8] The *Lots 50 & 51* court concluded that the venue provisions of Section 881(j), which expanded venue in civil forfeiture proceedings, would be rendered meaningless without corresponding nationwide service of process. *See id.* at 313. In *$10,000 in U.S. Currency*, 860 F.2d 1511 (9th Cir. 1988), the Court held that removal of a *res* from the territory of a court does not terminate a court's jurisdiction over the action. *See* 860 F.2d at 1513.

1992 amendments were intended to "clarify current law regarding an ambiguous legal issue — *e.g.*, whether it is necessary to base *in rem* jurisdiction on the location of property located overseas in civil forfeiture actions." (Pl.'s Jan. 14, 1994 Mem. at 34.)

It is clear to the Court that the 1992 amendments addressed a problem previously faced by courts in civil forfeiture actions — *viz.*, the lack of explicit statutory authority to issue process in order to secure *in rem* jurisdiction over assets located outside a court's territorial boundaries, and indeed, in a foreign country. As the Court has already discussed, *see supra* at 18-26, courts reached opposite conclusions on that question depending on whether the venue provisions of Section 881(j) and Section 981(h) were understood to provide "implied" authority to issue such extraterritorial process, and moreover, to require such process to effectuate their purpose.

To be sure, the 1992 amendments clarified that where a court had venue pursuant to a venue-for-forfeiture statute, it was also vested with the authority to issue process *in rem* against defendant assets, wherever located. As Judge Ross correctly found, however, this Court was not vested with venue pursuant to a venue-for-forfeiture statute when the action was brought, and thus, had no authority to assert *in rem* jurisdiction.[9] *See supra* at 9, 26-27.

Further, to accept the Government's argument that, because the 1992 amendments "clarified" existing law, [10] they should apply retroactively, would, as Judge Ross

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[9] The fact that the assets in this action are located in a foreign country is, in fact, a further issue. *See infra* at 37-43.

[10] The Government asserts that insofar as the 1992 amendments "clarified" existing law, they apply to this action, which was pending when the amendments were passed. (*See* Pl.'s Jan. 14, 1994

(continued)

found, be "wholly irreconcilable with the principle that jurisdiction is determined at the time of commencement of suit." (Report at 42 (citation omitted).) Clearly, the 1992 amendments clarified the relationship between venue and the authority to issue process *in rem*; the 1992 amendments also, significantly, expanded the statutory bases for venue and authorized *in rem* actions against assets located outside of this country. The latter expansions represent a jurisdictional grant that did not exist before the 1992 amendments, and to apply them to this action would retroactively authorize this Court to assert *in rem* jurisdiction over assets that, at the time this action was commenced, this Court was not authorized to reach. *See United States v. 51 Pieces of Real Property Roswell*, N.M., 17 F.3d 1306, 1312 (10th Cir. 1994) ("[E]ven if the provisions of [the 1992 amendments] were otherwise retroactive, *we doubt they could retroactively validate service of process that was invalid when executed.*") (emphasis added). As is made clear by pre-amendment case law, *see supra* at 21-23, this Court's authority to issue process *in rem*, and thus secure *in rem* jurisdiction, was dependent upon an

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(fn. continued)
Mem. at 31 n.3 (relying on *Leake v. Long Island Jewish Medical Ctr.*, 869 F.2d 130 (2d Cir. 1989) (per curiam), *aff'g* 695 F. Supp. 1414 (E.D.N.Y. 1988) and *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987). After a review of these cases, the Court adopts Judge Ross's analysis of the same:

As the Second Circuit recently clarified in *Butts*, however, "*Leake* and *Tirozzi* do not establish a new rule of construction that restorative legislation is presumed to apply retroactively . . . Rather, *Leake* and *Tirozzi* simply invite courts to use restorative language and intent as but one means of discerning congressional intent as to retroactivity." *Butts*, 990 F.2d at 1407. Since no such "restorative language" appears in the statute or legislative history at issue here, the authorities are inapposite.
(Report at 36-37.)

existing statute conferring venue on this Court. No such statute conferred venue in this case at the time the action was commenced and thus, no statute conferred the authority to assert *in rem* jurisdiction over Claimants' property in Hong Kong.

2. Ex Post Facto Clause

The Government also asserts that Judge Ross mistakenly "conclude[d] that the ex post facto clause bars the retroactive application of 28 U.S.C. § 1355 to this action." (Pl.'s Jan. 14, 1994 Mem. at 35.) The Government argues that at the time this action was commenced, Ko Sai-Man's alleged acts — namely illegally importing and selling heroin in the United States — constituted crimes under United States laws. (*See id.*) Thus, the Government argues, Ko Sai-Man "was or should have been on notice that he was violating United States law, and that the proceeds of his drug trafficking and drug money laundering transactions were subject to forfeiture to the United States." (*Id.*) Moreover, according to the Government, Judge Ross's reliance on *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), was misplaced as that case did not hold or state that the *ex post facto* clause applies in civil forfeiture cases. (Pl.'s Jan. 14, 1994 Mem. at 35 n.5.)

Relying on cases from other circuits that have held that the *ex post facto* clause does not apply to civil forfeiture actions, (*see id.* at 36-37 (citing *United States v. DKG Appaloosas, Inc.*, 829 F.2d 532 (9th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988); *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357 (9th Cir. 1986); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1993 WL 427376, at *12 (E.D. Pa. Oct. 21, 1993))), the Government argues that "th[is] Court should reverse Judge Ross's determination that the *ex post facto*

clause bars the retroactive application of 28 U.S.C. § 1355 to this action." (*Id.* at 37.)

Contrary to the Government's suggestion, however, Judge Ross did not hold that the *ex post facto* clause bars retroactive application of the 1992 amendments. Rather, Judge Ross applied a presumption in favor of applying the 1992 amendments in such a way as to avoid a constitutional issue. (Report at 42.) Clear Second Circuit precedent indicates that where retroactive application of a statute would raise "even a spectre of a constitutional issue," a court will choose to apply a statute prospectively in order to avoid that issue. *See Louis Vuitton S.A.*, 765 F.2d at 971; *see also id.* at 972 ("We do not decide that retroactive application of this statute would violate the *ex post facto* prohibition, only that it would raise the issue.").

Judge Ross found the Supreme Court's decision in *Austin* of great import. She indicated that *Austin*, which clearly found civil forfeiture actions punitive in nature, (*see* Report at 46 (quoting *Austin* 113 S. Ct. at 2804)), in conjunction with the language of the *ex post facto* clause, "raise grave doubts concerning the constitutionality of retroactively applying 28 U.S.C. § 1355(b) — rendering subject to *in rem* forfeiture assets previously free from monetary punishment — to cases pending§ the time of its enactment." (*See* Report§ 48.) The Court agrees.

As Judge Ross noted, (*see* Report at 48 n.13), the pre-*Austin* cases relied on by the Government are of little assistance in light of *Austin*'s recognition that civil forfeiture statutes have historically been considered, at least in part, as punishment. (*See id.* at 45; *cf. Apaloosas*, 829 F.2d at 540-44 (civil forfeiture provisions are primarily remedial and therefore *ex post facto* clause does not apply); and *5,644.540 in U.S. Currency*, 799 F.2d at 1364 n.8 (*ex post facto* clause does not apply

because Section 81(h) is civil, not criminal)); *see also United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207, 211 n.6 (9th Cir. 1995) (the holding of *$5,644,540* "brought into question by the Supreme Court's holding in *Austin*").

The Court, therefore, like Judge Ross, finds that the constitutional issues raised by retroactive application of the 1992 amendments favor applying the 1992 amendments prospectively only.

3. Case law Purportedly Construing the 1992 Amendments Retroactively

The Government proffers several cases in support of its argument that the 1992 amendments should apply retroactively. *See, e.g., United States v. One Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994); *see also United States v. Contents of Account No. 2033301*, 831 F. Supp. 337 (S.D.N.Y. 1993); *United States v. 18900 S.W. 50th Street*, 93-CV-30301 (N.D. Fla. Sept. 16, 1994); *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575 (E.D. Ga. 1993). Based on a review of these cases, however, the Court finds that they do not support the Government's position.

In only one of the above cases, *Piper Cherokee*, the court directly addressed whether the 1992 amendments applied to a pending case. In *Piper Cherokee*, the Government commenced in 1989 a civil forfeiture action directed at property outside the court's district. 37 F.3d at 491. The claimant moved to dismiss the action for lack of *in rem* jurisdiction because the subject property had never been brought into the district in which the civil forfeiture action was pending. *Id.* The *Piper Cherokee* court held that "even if [claimant's] contention is correct, recent congressional enactments clearly conferring jurisdiction upon the [district court] were

applicable to the action." *Id.* at 492. The court looked to the 1992 amendments, in particular to 28 U.S.C. § 1355(b)(1)(B):

> (b)(1) A forfeiture action or proceeding may be brought in —
>
> (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

28 U.S.C. § 1355(b)(1)(B).

The *Piper Cherokee* court found that venue had been conferred pursuant to Section 881(j) because a related criminal prosecution against the claimant had been brought in the same district. 37 F.3d at 492. Coupling that conclusion, with the clarification of the permissible reach of process contained in the 1992 amendments, the *Piper Cherokee* court found that *in rem* jurisdiction was properly asserted against the defendant asset which was located beyond the district court's territorial boundaries. By so doing, the *Piper Cherokee* court was never required to address the issue of whether *in rem* jurisdiction had been conferred when the action had been commenced.

In contrast to *Piper Cherokee*, no statute conferred venue in this case at the time that it was commenced. *See supra* at 25-27. The *Piper Cherokee* court's purported "retroactive" application, therefore, did not effect the result that the Government seeks in this case — *viz.*, to retroactively create venue as a basis of asserting *in rem* jurisdiction where such authority was absent when this action commenced. Likewise, in the remaining cases relied on by the Government, an existing venue statute conferred authority to assert *in rem* jurisdiction at the time the action was commenced, *see, e.g., One*

1990 Lincoln Town Car, 817 F. Supp. at 1577-78 ("[A]mended § 1355 shows that Congress intends district courts to have jurisdiction over a forfeiture action *whenever venue is properly had under a forfeiture statute* such as 18 U.S.C. § 981.") (citation omitted and emphasis added), or were filed after the effective date of the amendments. *See, e.g., United States v. Account No. 2033301*, 831 F. Supp. 337 (action filed after 1992 amendments); *United States v. 18900 S.W. 50th Street*, 93-CV-30301 slip op. (same).

Therefore, the Court rejects the Government's objections to Judge Ross's conclusion that the 1992 amendments do not apply retroactively. The Court thus turns to the Second Circuit's decision in *Castro Meza*.

C. The Significance of Castro Meza

In August, 1995, the Second Circuit issued its opinion in *United States v. All Funds on Deposit in Any Accounts in the Names of Heriberto Castro Meza*, 63 F.3d 148 (2d Cir. 1995), *aff'g* 856 F. Supp. 759 (E.D.N.Y. 1994) (Weinstein, J.), *petition for cert. filed*, 64 U.S.L.W. 3511 (Jan. 16, 1996) (No. 95-1134). This Court, in its Order dated September 15, 1995, called for further briefing from the parties as to the significance of *Castro Meza*, if any, on their respective positions regarding Judge Ross's conclusions that the 1992 amendments were not retroactive, and that the Court lacks *in rem* jurisdiction under statutory and case law as it existed prior to the 1992 amendments. Before addressing the further arguments made by the parties in light of *Castro Meza*, the Court reviews the decision itself.

The facts in *Castro Meza* were as follows. A criminal complaint was filed in the Eastern District of New York in October, 1990, charging Jose Santacruz Londono ("Santacruz") with conspiracy to distribute cocaine and

conspiracy to launder narcotics proceeds. 856 F. Supp. at 761. In July, 1993, a civil forfeiture action was commenced in this district against London accounts that had been restrained in 1988 pursuant to a request by the Justice Department in anticipation of the criminal action against Santacruz. *Id.* at 760-61. In September, 1993, at the request of the United States Marshal, copies of the warrant and verified complaint *in rem* in the civil forfeiture action were served on the accounts. *Id.* In November, 1993, claimant Heriberto *Castro Meza* filed a motion to dismiss the civil forfeiture action on the ground that the district court lacked *in rem* jurisdiction over the defendant accounts. *Id.* Subsequently, in March, 1994, the district court learned that the High Court of England ruled that the restraint thenceforth would be based on the civil forfeiture proceeding and not the prior criminal action against Santacruz. *Id.*

Judge Weinstein began his analysis with a discussion of subject matter jurisdiction and venue. *Id.* Beginning with the traditional rule that venue in forfeiture cases is proper only in the district where the property is found or into which the property is brought, Judge Weinstein traced the expansion of venue in civil forfeiture proceedings through the enactment of Section 981(h) and Section 881(j), and 28 U.S.C. § 1355. *Id.* Judge Weinstein then turned to the issue of *in rem* jurisdiction. *Id.*

"The issue of *in rem* jurisdiction over the defendant property is separate from subject matter and venue." *Id.* at 762 (citing *Accounts Nos. 3034504504 and 144-07143*, 971 F.2d at 980). As explained by Judge Weinstein, the problem presented by the lack of express authority for a court to issue process *in rem* outside of its respective district was solved with the enactment, in 1992, of 28 U.S.C. § 1355(d): "[t]he purpose of this provision was to clarify that Congress intended to confer *in rem* jurisdiction *to district courts which had venue*

pursuant to section 1355(b)." *Id.* (citations omitted and emphasis added).

The requirements of subject matter jurisdiction and venue having been met, Judge Weinstein then turned to the issue presented, *viz.*, whether service of process *in rem* on assets located in a foreign country effected a valid seizure of the property. *Id.* at 763. Judge Weinstein found that such a seizure had been effected. *Id.* "*In rem* jurisdiction over property exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely, enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *Id.* The claimants in *Castro Meza* appealed on the ground that the British authorities were not bound to remit the proceeds to the United States even if the district court ordered forfeiture, and thus, the district court lacked control over the subject property. 63 F.3d 148 at 151. In response, the government argued that "the only relevant inquiry under Section 1355 was whether any of the conduct giving rise to the forfeiture proceedings occurred in the district in which the action was commenced, even if the property is located in a foreign country." *Id.* at 152.

The Second Circuit soundly rejected this argument. *Id.* According to the court, the 1992 amendments were not intended to alter the traditional requirement of *in rem* jurisdiction that, in addition to subject matter and venue, *see id.* (citing *51 Pieces of Real Property Roswell, N.M.*, 17 F.3d 1306; *Contents of Accounts Nos. 3034504504*, 971 F.2d at 980-81), the court must secure control over the defendant assets. *Id.* The Second Circuit found, however, that, notwithstanding the lack of a binding obligation on the part of the British government to remit any of the subject funds, Judge Weinstein

was correct in his determination that control over the property was secured by the applicable treaty. *Id.* at 153.

In the case at bar, the Government asserts that the issue in *Castro Meza* was whether, in an *in rem* action directed at assets located in a foreign country, a district court had secured the requisite control over the defendant assets. (*See* Pl.'s Oct. 16, 1995 Suppl. Mem. at 7.) According to the Government, Hong Kong authorities have cooperated with the Government in this action and, thus, the requirement of "control" is met. (*See id.* at 8.)

Next, the Government notes that the Second Circuit, in discussing the 1992 amendments, cited to *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994). This reference, the Government suggests, constitutes an implicit approval by the Second Circuit of the "Ninth Circuit's conclusions" regarding those amendments, including their retroactivity. (*See* Pl.'s Oct. 16, 1995 Suppl. Mem. at 10.) Accordingly, the Government argues, this Court should apply the 1992 amendments retroactively and deny Claimants' motion for judgment on the pleadings.

Moreover, the Government argues that, even prior to the 1992 amendments, this Court had *in rem* jurisdiction over the Defendant properties in Hong Kong. In support of this argument, the Government asserts that in civil forfeiture actions, the venue provisions of Section 881(j) and Section 981(h) conferred *in rem* jurisdiction over extraterritorial properties, (*see* Pl.'s Oct. 23, 1995 Mem. at 2-8), and that "for the reasons stated in prior submissions by the United States, venue was proper in this district." (*Id.* at 8.)

Castro Meza does not alter this Court's conclusion that *in rem* jurisdiction was lacking in this action due to the absence of a statutory basis for venue at the time the action was commenced and, further, that the 1992

amendments do not retroactively confer such jurisdiction. First, neither the district court nor the Second Circuit in *Castro Meza* was required to address the dispositive issues in this action — namely, the interplay between the subject matter, venue and process statutes governing civil forfeiture actions prior to the 1992 amendments, and, additionally, whether the 1992 amendments can operate retroactively to confer *in rem* jurisdiction where none existed when the action was commenced. Rather, subject matter jurisdiction, venue and the authority to issue process *in rem* were not at issue before the district court and the Second Circuit in *Castro Meza*. The issue was whether the district court had secured adequate control over the foreign-based assets in order to effect a valid seizure.

Second, Judge Weinstein's opinion and that of the Second Circuit support the conclusion that the lack of an applicable federal statute conferring venue is fatal to the Government's argument that *in rem* jurisdiction may be asserted in this action. Both Judge Weinstein and the Second Circuit endorsed the view that, both before and after the 1992 amendments, subject matter jurisdiction, venue and valid process were and remain separate prerequisites to *in rem* jurisdiction. The Government's focus on the requisite control over the foreign-based Defendant properties in this action is, in fact, a further issue and not the sole issue. As the Second Circuit found:

> This control is required *in addition to the requirements of subject matter jurisdiction and venue. See, e.g., 51 Pieces of Real Property Roswell, N.M.*, 17 F.3d at 1310 . . .; *Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d at 980-81 (subject matter jurisdiction and venue

> are distinct from ability of court to serve process on property).

Castro Meza, 63 F.3d at 152 (emphasis added).

As to the impact of *Castro Meza* on the issue of whether the 1992 amendments are to be applied retroactively, this Court rejects the Government's argument that the Second Circuit's citation to *Piper Cherokee*, 37 F.3d at 492, *see Castro Meza*, 63 F.3d at 151, was an endorsement of retroactive application of the 1992 amendments; the Court further notes that the Second Circuit in *Castro Meza* also cited to *51 Pieces of Real Property*, 17 F.3d at 1310, *Castro Meza*, 63 F.3d at 152, which held that the 1992 amendments were not retroactive. *See 51 Pieces of Real Property*, 17 F.3d at 1312. For the reasons stated above, therefore, *Castro Meza* does not alter the Court's prior conclusions regarding the 1992 amendments and the law governing this action.

In light of the above, the Court rejects the Government's objections to Judge Ross's Report.[11]

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[11] The Court notes that, in a footnote without supporting authority, the Government requests that even if the Court concludes that venue is not proper in this district pursuant to the "acts or omissions" basis for venue added by the 1992 amendments, the Court should transfer this action to the District of Columbia, as provided by new 28 U.S.C. § 1355(b)(2). (*See* Pl.'s Jan. 14, 1994 Mem. at 38 n.6); *see also supra* at 11. First, the Court notes that the 1992 amendments, and the jurisdictional expansion contained therein, do not apply to this action. *See supra* at 27-32. Second, the Government has provided no support for the proposition that this Court, having adopted Judge Ross's conclusion that *in rem* jurisdiction is lacking in this action, may transfer it to another tribunal. Thus, the Court denies the Government's request in this regard.

Conclusion

For the foregoing reasons, the Court adopts the Report and Recommendation of Judge Ross. Claimants' motion for judgment on the pleadings is, therefore, granted.

SO ORDERED.

Dated: Hauppauge, New York
April 25, 1996

/s/ Denis R. Hurley
Denis R. Hurley
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
HAUPPAUGE OFFICE
APR 8 1996

UNITED STATES OF AMERICA,
Plaintiff,

-against-

CERTAIN FUNDS CONTAINED IN ACCOUNT NOS. 600-306211-006, 600-306211-011, AND 600-306211-014 LOCATED AT THE HONG KONG AND SHANG HAI BANKING CORPORATION, ACCOUNT NO. 064-788-1-003670-2 LOCATED AT THE HAU CHIAO COMMERCIAL BANK, THE CONTENTS OF SAFETY DEPOSIT BOX NO. 50109 LOCATED AT THE HANG SENG BANK LIMITED, CERTAIN ITEMS OF JEWELRY, AND PERSONAL PROPERTY VALUED AT $1,131,200.00 HK, CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 3, 2/F, HOUSTON CENTRE, 63 MODY ROAD, KOWLOON, HONG KONG, CERTAIN REAL PROPERTY AND PREMISES KNOWN AS UNIT 19, 2/F, HOUSTON CENTRE, KOWLOON, HONG KONG, CERTAIN REAL PROPERTY AND PREMISES

KNOWN AS 107 SHANGHAI STREET, MONGKOK, KOWLOON, HONG KONG, CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 6/F, SAI TEUNG CHOI STREET, KOWLOON, HONG KONG, CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 4/F, NO. 52, SAI YEUNG CHOI STREET SOUTH, KOWLOON, HONG KONG, CERTAIN REAL PROPERTY AND PREMISES KNOWN AS FLATS A1 AND FLATS A2, 9F AND ROOF AND CAR PARK NOS 10 & 23, G/F, TWILIGHT COURT, NO. 4 MARCONI ROAD, KOWLOON, HONG KONG, ONE SAAB 9000T16 AUTOMOBILE, REG NO DW2182, 960 SHARES OF STOCK IN THE EAST ASIA BANK LIMITED, CERTAIN NATIONAL CURRENCIES HELD BY THE RHKP, 10,000 SHARES IN WHARF HOLDINGS LIMITED, $3,600.00 HK HELD BY THE RHKP, AND, 25% INTEREST IN WEALTH HOME DEVELOPMENT LIMITED,

Defendants.

KO SAI MAN, AND
CHIU KIM CHUN,

Claimants.

JUDGMENT
91-CV-3642 (DRH)

A Memorandum and Order of Hon. Denis R. Hurley, United States District Judge, having been filed on March 29, 1996, adopting the Report and Recommendation of Magistrate Ross (now Magistrate Judge Ross), filed on November 16, 1993, and granting claimants' motion for judgment on the pleadings, it is

ORDERED and ADJUDGED that the plaintiff, United States of America, take nothing of the defendants Certain Funds contained in Account Nos. 600-306211-006, 600-306211-011, and 600-306211-014 located at the Hong Kong and Shang Hai Banking Corporation, Account No. 064-788-1- 003670-2 located at the Hau Chiao Commercial Bank, the Contents of Safety Deposit Box No. 50109 Located at the Hang Seng Bank Limited, Certain Items of Jewelry personal property valued at $1,131,200.00 HK, Certain Real Property and Premises known as 3, 2/F, Houston Centre, 63 Mody Road, Kowloon, Hong Kong, Certain Real Property and Premises known as Unit 19, 2/F, Houston Centre, Kowloon, Hong Kong, Certain Real Property and Premises known as 6/F, Sai Teung Choi Street, Kowloon, Hong Kong, Certain Real Property and Premises known as 4/F, No. 52, Sai Yeung Choi Street South, Kowloon, Hong Kong, Certain Real Property and Premises known as Flats A1 and Flats A2, 9F and Roof and Car Park Nos 10 & 23, G/F, Twilight Court, No. 4 Marconi Road, Kowloon, Hong Kong, One Saab 90-00T16 Automobile, Registration No. DW2182, 960 Shares of Stock in the East Asia Bank Limited, Certain National Currencies held by the RHKP, and 10,000 Sshares in Wharf Holdings Limited, $3,600.00 HK held by the RHKP and, 25% interest in Wealth Home Development Limited; and that the plaintiff's action is hereby dismissed.

Dated: Hauppauge, New York
April 08, 1996

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ JOSEPH DI TALIA
JOSEPH DI TALIA
Deputy Clerk-in-Charge

Supreme Court, U. S.
FILED
JAN 10 1997
CLERK

No. 96-918

In the Supreme Court of the United States

OCTOBER TERM, 1996

KO SAI-MAN AND CHUI KIM-CHUN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

5 pp

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KO SAI-MAN AND CHUI KIM-CHUN, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing a civil forfeiture action for lack of jurisdiction.

1. On September 20, 1991, the government filed a verified complaint *in rem* in the Eastern District of New York seeking forfeiture of assets, valued at between 1.5 and 3 million dollars, located in Hong Kong. The complaint alleges that the defendants *in rem* constitute proceeds of a conspiracy to smuggle heroin into the United States and to launder the proceeds of that smuggling, in violation of 21 U.S.C. 841 *et seq.* Pet. App. A3-A4.

On October 15, 1991, petitioners, who are citizens and residents of Hong Kong, filed a claim to the prop-

erty that did not challenge the district court's jurisdiction over the *res*. On April 6, 1992, petitioners sought dismissal of the complaint on the ground that no statute conferred jurisdiction on the federal courts over a *res* located outside the United States. The government in its response asserted, inter alia, that petitioners had waived this objection by failing to object to jurisdiction in their original claim and answer. Pet. App. A4-A5.

In October 1992, while petitioners' motion was under advisement, the statute conferring jurisdiction on federal courts over civil forfeiture proceedings was amended to provide district courts with *in rem* jurisdiction over a *res* located in a foreign country. Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1521, 106 Stat. 4062. The statute, 28 U.S.C. 1355, was amended by adding a new part (b), which provides in pertinent part that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought" in the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred.

Following the enactment of this amendment, the parties presented arguments on the question whether the statute applied retroactively. The district court adopted a magistrate's report and recommendation, and dismissed the civil forfeiture action. Pet. App. B1-B42. The court concluded that the presumption against retroactive legislation was not overcome by a clear showing of congressional intent to make the amended Section 1355(b) retroactive. The court also

found (Pet. App. B32-B34) that retroactive application of the statute might violate the Ex Post Facto Clause of the Constitution.

The court of appeals reversed. Pet. App. A1-A17. Applying the principles enunciated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court held (Pet. App. A8) that the application of the new amendment to 28 U.S.C. 1355 to civil forfeiture proceedings pending when the amendment became effective would be appropriate, because such application "would not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct." The court also concluded (Pet. App. A16) that, in light of *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the retroactive application of the amendment would not raise a substantial doubt as to its constitutionality under the Ex Post Facto Clause.

2. Petitioners contend (Pet. 11-19) that the presumption against retroactive legislation bars application of amended 28 U.S.C. 1355(b) to forfeiture actions pending at the time of its enactment. Petitioners further contend (Pet. 19-26) that the retroactive application of 28 U.S.C. 1355(b) raises concerns under the Ex Post Facto Clause of the Constitution and that the provision must therefore be applied prospectively to avoid a constitutional question. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioners. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners prevail in their claim to the *res*, their contention will be moot. If the *res* is forfeited to the government, petitioners can

appeal to the court of appeals raising any issues that may be available to them. If the court of appeals affirms the forfeiture, petitioners will then be able to present their present contentions to this Court, together with any other contentions they may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.